(26,704)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 618.

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, PETITIONER,

vs.

YNCHAUSTI & CO. ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 4, 1919.

1–3 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

G. R. No. 11899.

YNCHAUSTI & COMPANY, COMPAÑÍA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT & COMPANY, and FERNANDEZ HERMANOS, Petitioners,

versus

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Respondent.

(Original Jurisdiction.)

Petition for Review.

Be it remembered that on the dates respectively mentioned, the following proceedings were had in the above-entitled case:

On June 7, 1916, the petitioners by their attorneys filed with the office of the clerk of the Supreme Court of the Philippine Islands the following complaint.

4 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

[G. R. No. 11899.]

YNCHAUSTI & COMPANY, COMPAÑÍA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT & COMPANY, and FERNANDEZ HERMANOS, Petitioners,

versus

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Respondent.

Petition for Review.

Now come the petitioners in the above-entitled cause, by their undersigned attorneys, and respectfully represent to this honorable court:

I.

That your petitioner Ynchausti & Co. is a commercial partnership duly organized and existing under and by virtue of the laws of the

Philippine Islands, having its principal place of business at Manila in said Philippine Islands.

That your petitioner Compañía General de Tabacos de Filipinas is a corporation, duly organized and existing under and by virtue of the laws of the Kingdom of Spain and duly registered and licensed for the transaction of business in the Philippine Islands, having its domicile therein at Manila in said Philippine Islands.

5 That your petitioner J. M. Poizat & Co. is a commercial partnership duly organized and existing under and by virtue of the laws of the Philippine Islands, having its principal place of business at Manila, in said Philippine Islands.

That your petitioner Fernandez Hermanos is a commercial partnership duly organized and existing under and by virtue of the laws of the Philippine Islands, having its principal place of business at Manila in said Philippine Islands.

That each of said petitioners is now, and at all of the times hereinafter mentioned has been, engaged in business therein as a common carrier of passengers and merchandise by water.

II.

That the respondent is an administrative Board organized under and pursuant to the provisions of Act No. 2307 of the Philippine Legislature.

III.

That on or about the 9th day of May, 1916, the respondent Board issued and caused to be served upon the petitioners herein, and each of them, on order to make answer to a certain complaint of the Director of Posts of the Philippine Islands and to show cause why the said petitioners should not be required to desist from the determination of said petitioners to decline, on and after June 1, 1916, to transport the mail matter of the Government of the Philippine Islands, on their steamers, unless compensated for said service, and be required to accept and carry the said mail matter free of charge; the said proceedings being known and designated in the records of respondent Board as Case No. 781 of said Board.

IV.

That within the time specified in said order to show cause, to wit, on the 12th day of May, 1916, your petitioners made joint answer thereto in writing and made opposition to the proposed order of said Board upon the following grounds, to wit:

(*a*) That the performance of the mail service mentioned
6 and referred to in said order to show cause involves the rendition of services which are arduous, extensive, and costly, at the cost and expense of petitioners.

(*b*) That the performance of said services by the petitioners subjects the latter to repeated and grave annoyances, trouble, and

expense and greatly hinders, hampers, and interfers with the prompt dispatch of the vessels of petitioners, and causes to said petitioners grave loss and injury.

(c) That the respondent Board has no authority in law to require petitioners, or either or any of them, to render and perform said free services in that section 309 of Act No. 2657 of the Philippine Legislature and Customs Administrative Circular No. 627 relied upon by said Board, and by the complainant before said Board, were and are invalid, as being unjust, unreasonable, and confiscatory and as constituting an unlawful attempt to deprive your petitioners of their property without due process of law, and of the equal protection of the law, and to take the private property of said petitioners for a public use without due compensation, all contrary to and in violation of the Constitution of the United States, and the amendments thereof, and to the Act of Congress of July 1, 1902, entitled "an Act temporarily to provide for the administration of the affairs of civil government of the Philippine Islands and for other purposes."

V.

That thereupon the respondent Board set the matter down for hearing and at the time and place so designated a hearing was had.

VI.

That thereafter, to wit, on the 1st day of June, 1916, the respondent Board entered an order overruling the objections made by petitioners in their answer to the order to show cause, and requiring petitioners to comply with section 309 of said Act No. 2657 and not to refuse the free carriage of the mail matter of said Government of the Philippine Islands and to continue to receive and transfer said mail matter as theretofore.

7 VII.

That petitioners are dissatisfied with the said decision of the respondent Board upon the grounds that the same is in violation and an infringement of the constitutional rights of the petitioners for the reasons aforesaid, is unwarranted in law, and that the requirements thereof are beyond the constitutional powers and authority of said respondent Board and of the Legislature by which said Board has been created.

Wherefore petitioners pray this honorable court, in accordance with the provisions of section 37 of Act No. 2307, to require the respondent Board to certify forthwith to the Court the records of all proceedings had before the said Board in said Case No. 781, so that the same may be considered, and that upon such hearing and consideration the decision of the respondent Board herein complained of be annulled and set aside, and that petitioners recover their proper costs.

GILBERT, COHN & FISHER,
By CHARLES C. COHN,
Attorneys for Petitioners.

Manila, P. I.,

June 5, 1916.

Copy furnished this day to the Attorney-General as counsel for Director of Posts of the Philippine Islands.

GILBERT, COHN & FISHER,
By CHARLES C. COHN.

Thereafter, on June 28, 1916, Hon. Grant T. Trent, Associate Justice of the Supreme Court, acting in vacation, upon considering the above complaint filed by the petitioners, issued the following order:

THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

[G. R. No. 11899.]

YNCHAUSTI & COMPANY, COMPAÑÍA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT & COMPANY, and FERNANDEZ HERMANOS, Petitioners,

versus

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Respondent.

8 *Order.*

After hearing the petition filed by the companies, petitioners in the above-entitled case, wherein it is prayed that, pursuant to the provisions of Act No. 2307, an order issue requiring the Board of Public Utility Commissioners to certify to this honorable court all the proceedings of this case and before said Board, and that after due hearing the decision therein rendered be set aside and annulled.

Now, therefore, the said Board is hereby ordered to forward to this court, within ten days, a certified copy of all the proceedings had before the aforesaid Board, together with its order entered in the said case.

GRANT T. TRENT,
Associate Justice of the Supreme Court,
Acting in Vacation.

Manila, June 28, 1916.

Thereafter, on July 1, 1916, a certified copy of the record of the Board of Public Utility Commissioners in its Case No. 781 was forwarded to the Supreme Court as appears from the following letter of transmittal:

The Government of the Philippine Islands,

Board of Public Utility Commissioners.

Manila, June 30, 1916.

GENTLEMEN: In compliance with your order of June 28, 1916, in R. G. No. 11899, I beg to inclose herewith a certified copy of the record of this Board in its Case No. 781.

By direction of the Board:

C. C. MITCHELL, *Secretary.*

The Supreme Court of the Philippine Islands, Manila.

[Inclosure.]

9 UNITED STATES OF AMERICA,
The Government of the Philippine Islands, Manila:

(Before the Board of Public Utility Commissioners.)

[Case No. 781.]

DIRECTOR OF POSTS

vs.

YNCHAUSTI & Co. et al.

Refusal to Accept and Carry Gratuitously Official Mail After June 1, 1916.

First Indorsement.

The Government of the Philippine Islands,

Department of Commerce and Police,

Bureau of Posts.

Manila, May 9, 1916.

Respectfully referred to the Board of Public Utility Commissioners with request that an order be issued directed to the within-named shipping firms (public utilities) commanding each of them to comply with the law relating to the carriage of the mails and to instruct the masters and agents of their vessels plying between Philippine ports to continue to accept and carry the mails after June 1, 1916.

In this connection, the attention of this honorable Board is invited to the provisions of section 309 of Act No. 2657 and section 16 of the Act creating the Board of Public Utility Commissioners. Said section 309 (which was made effective by proclamation of the Gov-

ernor-General dated March 1, 1916, see 14 Official Gazette, p. 703) provides as follows:

"Contracts on behalf of the Insular Government with companies operating vessels engaged in the coastwise trade to secure the carriage of freight and passengers for the Government shall be executed by the Secretary of Commerce and Police, subject to such restrictions as may be prescribed by law; but vessels engaged in the coastwise trade and vessels plying between Philippine ports shall continue to carry mail free."

Section 16 of Act No. 2307 as amended by Act No. 2362 provides, in part, that:

"The Board shall have power, after hearing, upon notice by order in writing, to require every public utility as herein defined:

(*a*) To comply with the laws of the Philippine Islands and with any provincial resolution or municipal ordinance relating thereto and to conform to the duties imposed upon it thereby or by the provisions of its own charter, whether obtained under any general or special law of the Philippine Islands."

R. M. SHEARER.
Director of Posts.

Gilbert, Cohn & Fisher,

Counselors at Law.

Manila, P. I., May 4, 1916.

The Director of Posts, Manila, P. I.

SIR: We are directed by our clients Messrs. Ynchausti & Co., The Compañía General de Tabacos de Filipinas, Poizat & Co., and Fernandez Hermanos, respectfully, to inform you that on and after June 1, 1916, those firms, and each of them, will decline to transport mail matter on their steamers for the Insular Government unless paid for this service.

Very respectfully,

GILBERT, COHN & FISHER,
By F. C. FISHER.
Attorneys for Ynchausti & Co., the Compañía General de Tabacos de Filipinas, Poizat & Co., and Fernandez Hermanos.

11 UNITED STATES OF AMERICA,
Philippine Islands:

(Before the Board of Public Utility Commissioners.)

[Case No. 781.]

In the Matter of the Complaint of the Director of Posts against the Shipping Firms Ynchausti & Co., Compañía General de Tabacos de Filipinas, J. M. Poizat & Co., and Fernandez Hermanos Concerning the Refusal of said Firms to Accept and Carry on Their Steamers Official Mails of the Government Free of Charge.

Order.

It appearing from the letter addressed to the Director of Posts by the attorneys for the steamship companies of this city Ynchausti & Co., Compañía General de Tabacos de Filipinas, J. M. Poizat & Co., and Fernandez Hermanos, that these companies, from and beginning the 1st of June next, will decline receiving and carrying the official mails of the Government on their steamships, unless they be paid for this service; and upon indorsement of the said letter by the Director of Posts to this Board, the said Director requests that an order be entered compelling the aforesaid companies to comply with the existing laws and to continue receiving and transporting on their ships, as heretofore, the official mail of the Government, notwithstanding their proposed action for June 1, let this matter stand as a formal complaint. And let copies of same be served upon the aforesaid steamship companies, or their attorneys, in order that they may answer it within four days, and immediately after the filing of their answers let a date be fixed for the hearing.

Approved.

I hereby certify that the foregoing is a true and correct copy of the original on file in this office.

C. C. MITCHELL, *Secretary.*

Manila, May 10, 1916.

12 UNITED STATES OF AMERICA,
Philippine Islands, Manila:

(Before the Board of Public Utility Commissioners.)

[Case No. 781.]

THE DIRECTOR OF POSTS

vs.

YNCHAUSTI AND COMPANY et al.

Re Refusal to Accept and Carry Gratuitously Official Mail After June 1, 1916.

Messrs. Ynchausti & Co., Compañía General de Tabacos de Filipinas, Messrs. J. M. Poizat & Co., Messrs. Fernandez Hermanos, Messrs. Gilbert, Cohn & Fisher, Greeting:

You are hereby required to answer the complaint of the complainant herein, copy of which is hereto attached and herewith served upon you, within four days from the date of this order.

Witness, the Honorable Mariano Cui, President of the Board of Public Utility Commissioners, this 9th day of May, 1916.

[Seal of the Board of Public Utility Commissioners.]

C. C. MITCHELL,
Secretary of the Board.

[Inclosure.]

UNITED STATES OF AMERICA,
Philippine Islands, Manila:

(Before the Board of Public Utility Commissioners.)

[Case No. 781.]

THE DIRECTOR OF POSTS

vs.

YNCHAUSTI & Co. et al.

Now come the defendants in the above-entitled proceeding and complying with the citation of this honorable Board herein issued under date of May 9, 1916, respectfully answer and show:

13 I.

That, now and at all times hereinafter mentioned, the said defendants are and have been, and each of them is and has been, en-

gaged in the business of common carrier, to wit, in the carriage of passengers and freight for hire between various ports of the Philippine Islands in vessels duly licensed for the coastwise trade in the Philippine Archipelago.

II.

That said defendants are now, and for some time last past have been, required and compelled by the Director of Posts of the Philippine Islands and by the Collector of Customs of said Islands, under threat of the temporary or permanent disqualification of the masters of said vessels, and otherwise, to render and perform, without payment, compensation, or reward therefor, certain arduous and costly services, and to wholly pay and defray the cost and expense thereof, namely:

(*a*) The carriage of all mails tendered for transportation in a safe and secure manner and free from injury by water or otherwise between said ports of the Philippine Islands.

(*b*) The giving of prompt advance notice of the intended sailing of said vessels to the post master at each port of departure in ample time to permit the making up of mails for dispatch.

(*c*) The communication to such postmasters of any changes in the sailings of such vessels.

(*d*) The delivery of all mails so carried by such vessels at ports of call on shore or on a wharf immediately after arrival and prior to discharge or lading of any cargo, and the delivery thereof from shore or wharf to such vessels just before the vessels' sailing time.

(*e*) The maintenance on said vessels of lock boxes to receive letters, papers, or other mail matter delivered on board after the mails have been closed at the post office for that particular voyage and the delivery of such mail matter, so deposited on board, to the postmaster at a port of call of such vessels.

14 III.

That during the times herein mentioned there has been instituted and inaugurated in the Philippine Islands, and there is now in full operation, a system of parcels posts whereby there is included in the mail matter of the Philippine Islands, in addition to the correspondence and printed matter therein embraced, sundry and diverse merchandise of important and increasing quantity and bulk, and consisting in part of articles similar to those which the said vessels have heretofore carried and still carry as freight for hire.

That by reason of the free carriage of the mails, so required and compelled as aforesaid, the defendants have been and are required to lose and sacrifice unto such purpose a large and appreciable portion of the carrying space and capacity of such vessels which would otherwise be available for the carriage of freight for hire, and have furthermore been compelled to aid and assist, by free and gratuitous services, in an effective competition with its own business of common carrier.

IV.

That at various and many of the ports of call of the vessels of said defendants, the necessary and proper anchorage of said vessels is situated at a considerable distance from the post office at such port and the means of communication and of travel between said anchorage and said post office are scarce, slow, costly, and grossly inadequate.

That the said defendants have been, and now are, subjected to repeated and grave annoyances, trouble and expense, and the vessels of said defendants have been and now are greatly hindered, hampered, and interfered with in the prompt dispatch thereof, by reason of the facts aforesaid and by the requirement to communicate in advance the intended sailing hour of said vessels, or any change thereof and to deliver certain mails at the shore or wharf before unlading the cargos of said vessels, and to deliver certain mail matter at the post offices of said ports of call, all to the grave loss and injury of these defendants.

15 V.

That the defendants have not, nor has either *nor* any of them, consented, agreed, or stipulated that the said vessels of defendants or any of them shall perform the free and gratuitous services hereinabove mentioned and referred to; but the said services have been and are being performed by said defendants, at the sole and exclusive cost and expense of the said defendants, under duress and under due protest by said defendants and each of them.

VI.

That section 309 of Act No. 2657 of the Philippine Legislature and Customs Administrative Circular No. 627, under and by virtue of which the said Director of Posts and the said Collector of Customs have been and are exacting from said defendants the requirements aforesaid, are unjust, unreasonable, and confiscatory, in that the same would, and will, if enforced, deprive said defendants and each of them of their property without due process of law, and deprive them of the equal protection of the law, and take the private property of said defendants for a public use without due compensation, all contrary to and in violation of the Constitution of the United States and the amendments thereof and to the Act of Congress of July 1, 1902, entitled "an Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands and for other purposes."

Wherefore your defendants respectfully pray that they and each of them be absolved from the complaint of the complainant herein and be dismissed without delay.

GILBERT, COHN & FISHER,
By CHARLES C. COHN,
Attorneys for Defendants.

Copy hereof has this date been sent to Director of Posts by mail.
CHARLES C. COHN.

Manila, P. I., May 12, 1916.

16 UNITED STATES OF AMERICA,
The Government of the Philippine Islands:

(Before the Board of Public Utility Commissioners.)

[Case No. 781.]

DIRECTOR OF POSTS

vs.

YNCHAUSTI & Co. et al.

Refusal to Carry Gratuitously Official Mail After June 1, 1916.

Notice of Hearing.

Notice is hereby given that the above case will be heard by the Board of Public Utility Commissioners in its office, San Agustin Building, Manila, on Wednesday, May 17, 1916, at 9 o'clock a. m.

Witness the Honorable Mariano Cui, President of the Board of *the* Public Utility Commissioners, this 13th day of May, 1916.
C. C. MITCHELL, *Secretary.*

UNITED STATES OF AMERICA,
Philippine Islands:

(Before the Board of Public Utility Commissioners.)

[Case No. 781.]

DIRECTOR OF POSTS

vs.

YNCHAUSTI & Co. et al.

Now come the defendants in the above-entitled proceeding and respectfully petition this honorable Board and pray that the hearing of the above-entitled matter, heretofore set and assigned for the 17th day of May, 1916, at the hour of 9 a. m. thereof, be transferred and postponed to the 26th day of May, 1916, at said hour 9 a. m. of said day.

Said petition is based upon the ground that the time intervening between the commencement of the within proceedings and the date of hearing first hereinabove mentioned has not been sufficient to

enable said defendants to prepare an orderly presentation of its proof herein.

Respectfully submitted.

GILBERT, COHN & FISHER,
By CHARLES C. COHN,
Attorneys for Defendants.

Manila, P. I., May 16, 1916.

17 UNITED STATES OF AMERICA,
The Government of the Philippine Islands, Manila:

(Before the Board of Public Utility Commissioners.)

[Case No. 781.]

DIRECTOR OF POSTS

vs.

YNCHAUSTI & Co. et al.

Refusal to Carry Gratuitously Official Mail After June 1, 1916.

Postponement of Hearing.

Notice is hereby given that the hearing of the above case has been postponed upon the written petition of the attorney for the defendant companies. The hearing of this case is hereby set for Friday, May 26, 1916, at 9 a. m., at the offices of the Board, San Agustin Building, Manila.

Witness the Honorable Mariano Cui, President of the Board of Public Utility Commissioners, this 17th day of May, 1916.

C. C. MITCHELL, *Secretary.*

Copies furnished:
Messrs. Ynchausti & Co.
Compañía General de Tabacos de Filipinas.
Messrs. J. M. Poizat & Co.
Messrs. Fernandez Hermanos.
Messrs. Gilbert, Cohn & Fisher.
The Director of Posts.
The Insular Collector of Customs.
The Attorney-General

UNITED STATES OF AMERICA,
The Government of the Philippine Islands, Manila:

(Before the Board of Public Utility Commissioners.)

[Case No. 781.]

THE DIRECTOR OF POSTS

vs.

YNCHAUSTI & Co. et al.

Memorandum for Director of Posts.

The only relevant material fact for the consideration of this honorable Board is the refusal of the public utilities named to accept and transport the mails as required by law subsequent to June 1, 1916. The foregoing determination is shown by the notice served on the Director of Posts which has been referred to the Board with request that an order be issued directed to the shipping firms in question commanding them to comply with the law relating to the carriage of the mails.

18

The provisions of law dealing with this subject (sec. 309, Act. No. 2567) is clear and leaves no room for construction. It is not alleged (see Par. VI of defendants' answer) that said section is ambiguous or that its enforcement has been arbitrary, but it is merely contended that said provision of law is "in violation of the Constitution of the United States and the amendments thereof and to the Act of Congress of July 1, 1902." This assertion or allegation of the defendants does not warrant the granting of their prayer to be absolved from the complaint. The Board of Public Utility Commissioners is not empowered to determine such an issue (the constitutionality of laws enacted by the Philippine Legislature).

As pointed out in the indorsement of the Director of Posts, it seems clear that under the law it is the duty of this Board to issue the order requested, and leave for the decision of the proper authority (the Supreme Court) the issue suggested by the defendants relative to the constitutionality of the Act in question.

Respectfully submitted.

RAMON AVANCEÑA,
Attorney-General.

Manila, May 26, 1916.

UNITED STATES OF AMERICA,
The Government of the Philippine Islands, Manila:

(Before the Board of Public Utility Commissioners.)

[Case No. 781.]

DIRECTOR OF POSTS

vs.

YNCHAUSTI & COMPANY et al.

Re Refusal to Carry Gratuitously Official Mail After June 1, 1916.

Hearing held before President Cui and Member Bonsal, in the offices of the Board on May 26, 1916, at 9 a. m.

19 W. G. MASTERS, after being duly sworn, made the following statements:

Q. Please state your name, residence, and occupation.

A. Masters, W. G.; Assistant Director of Posts, at present time Acting Director; residence, Manila Hotel.

Q. Mr. Masters, for how many years have you been connected with the Philippine Postal Service?

A. 17 years.

Q. Please state, Mr. Masters, whether or not at the present time the mail matter in the Philippine Islands between post offices on the routes of the interisland steamers are being carried in pursuance of Customs Circular No. 627?

A. They are.

Q. Please state, Mr. Masters, in a general way, whether or not the volume of mail matter carried on these interisland vessels is increasing or decreasing?

A. That would be rather difficult to state without taking time to dig into the records. I could not say offhand. Conditions have changed at times so that there might be more one year than another. The general postal receipts have increased.

Q. Your general postal receipts of the Philippine Islands have increased year by year?

A. Taking the telegraph and the postal receipts, there has been some increase. I could not say how much.

Q. Eliminate the telegraph if you can, and please state whether or not there has not been a constant increase, material in extent, from year to year in the volume of mail matter handled by your Bureau.

A. I think there has been a slight increase. It must be understood, however, that this is simply a guess. But we have records which will show whether or not there has been any increase.

In that event I ask that the witness be requested to prepare such record showing the volume of mail matter carried, and showing the increase during the past three years.

Our annual report shows each year the number of bags of mail received by the Manila post office and dispatched to outside post offices by means of steamer. I do not believe records would be available to show the number of bags or pouches dispatched to Manila from outside offices.

Q. Can you say whether or not the increase in the volume
20 of business transacted at the Manila office indicates the increase in the volume in the outlying offices?

A. Not necessarily. When the European war broke out it affected the Manila office, whereas it did not affect the outside offices to any extent. I can state approximately the number of bags or pouches that were received by the Manila office and dispatched to outside offices in 1915.

Q. Please so state.

A. About 81,000 bags.

Q. Please state, Mr. Masters, as nearly as you can, the maximum volume of any one mail dispatched by one vessel.

A. The most important dispatch to interisland ports is to Cebu and Iloilo. There have been times when the number of bags or pouches was up to 100 bags by one steamer.

Q. Is it not a fact, Mr. Masters, that there have been times, frequent times, when the number of bags or pouches shipped from Manila to Iloilo would exceed 200?

A. I do not know. There may be times, but not very often. I just state this on information I secured from the superintendent before I left the office.

Q. Is it not a fact that if there has been a very big mail from the United States that the mail from Manila to Iloilo is over 200 sacks?

A. I do not know.

Q. In the mail carried on the interisland steamers between Manila and other ports and between the outside offices and Manila, what is there included besides letters, newspapers, or printed matter?

A. Various classes of mail that are acceptable through the mails in other countries which are divided into classes—first class, including letters; second class, newspapers; third class, printed books; and fourth class, everything not included in the other classes which would include merchandise which is not prohibited in the mails.

Q. Is it not a fact that in addition to letters, newspapers, and printed matter the Manila office receives from foreign countries and distributes to the outlying post offices in the Philippine Islands merchandise in parcels?

A. Yes.

Q. Now, Manila post office receives and ships such parcels that originate in the city of Manila, does it not?

A. Yes.

Q. Will you state the limitation on these parcels regarding size and weight?

A. Five kilos.

21 Q. Any limitation as to size?

A. Yes. I do not remember exactly just what these limitations are at present.

Q. Do the same limitations apply as to merchandise received in mails from foreign countries? Or do you accept and forward anything that is acceptable at foreign offices?

A. Well, if it is not prohibited by our own regulations—postal or customs regulations.

Q. Is money in currency or in coin received and shipped by mail?

A. Not from other countries.

Q. Is it from this country?

A. In our domestic mail service.

Q. And all that mail matter is shipped by interisland vessels from Manila to outlying post offices?

A. Yes.

Q. Will you please state, Mr. Masters, as nearly as you can, the saving that is effected by the Government of the Philippine Islands by requiring this mail matter to be carried on interisland vessels free of any compensation?

A. It would be impossible to state that until you have a basis as to what compensation would be arrived at. If it was so much a bag, then you could arrive at one result; if the length of haul and weight, you would arrive at another result. But it would be impossible to arrive at any result without first coming to a conclusion as to what basis is to be used. It would be impossible to even make a guess.

Q. Well, supposing that the saving be computed on the basis of the present freight rates established by the existing schedule of freight.

A. I do not know what they are. Furthermore, we keep no weights in our domestic service as to mails received or carried by interisland steamers.

Q. Is it not a fact, Mr. Masters, that the Bureau of Posts has compiled an estimate of that saving and has arrived at a conclusion that more than ₱100,000 per annum is saved by the Government by reason of this free service?

A. Not to my knowledge. I never prepared anything of the kind or heard of it until you mentioned it now.

Q. Is it not a fact that at one time in the history of these Islands the mail, or a large part thereof, was carried on vessels by reason of a contract with the Government of the Philippine Islands establishing certain mail routes on schedules of sailings?

A. No; I don't understand that. They were not known
22 as mail routes, and the contracts called for the transportation of Government passengers, freight, and mail.

Q. The transportation of passengers for the Government under these contracts was compensated to the carrier by the Government at so much per passenger in accordance with the number of passengers and length of trip; and, in addition to that, did not the contract provide for a compensation of a flat sum per annum and provide that the mails should be carried free?

A. Yes.

Q. What was the aggregate amount of this?

A. Well, I was a member of the committee at the time and as I recall, the sum was ₱220,000 for a term of five years.

Q. ₱220,000 a year?

A. Yes; I think that was it.

Q. That period has now expired?

A. Yes.

Q. And these contracts have not been continued?

A. They were continued for a year or two after the five year period, and since then there has been appropriated ₱50,000 per annum.

Q. And do you know how much of that appropriation of ₱50,000 has been expended under contract?

A. No; that is handled in the office of the Secretary of Commerce and Police.

Q. No part of that money, however, is for carrying mail?

A. No.

Q. Are the mails of the Bureau of Posts of the Philippine Islands between Manila and places within reach of the Manila Railroad Company, carried by that railroad company?

A. Yes.

Q. Is that service a free service or compensated by the Government?

A. That is compensated.

Q. Please state the amount of that compensation in round figures, per annum.

A. The minimum rate paid is ₱52.15 per kilometer per annum. I could not say just what we are paying, but most of the lines are paid at the minimum rate.

Q. At that minimum, what does the expenditure of the Government per annum amount to in general figures?

A. About ₱90,000.

23 Q. How does this compare in volume—that is, the mail carried by the Manila Railroad Company—with that carried by the interisland steamers? This in regard to both the quantity of mail and the distance it is carried.

A. That would be pretty hard to state without consulting the records.

Q. Is it not a fact that the volume of the service by the interisland steamers is far greater than the volume of service performed in this connection by the Manila Railroad?

A. I should say it would be greater, because the interisland steamers supply a greater territory. The railroad only supplies the Island of Luzon and the interisland steamers supply all the surrounding islands.

Q. Are you familiar, Mr. Masters, with the conditions of the ports of call of the interisland steamers, relative to the location of suitable anchorages and distances of those anchorages from the post office?

A. No.

Cross-examination:

Q. In your opinion, Mr. Masters, is the volume of mail at present greater than it was in 1902 and 1903 and 1904, when there were something like 60,000 or 70,000 American troops in the Islands?

A. No; I do not think that it is as great.

Q. You state that the mails have not been weighed, so that the number of bags would not necessarily be a good criterion?

A. Well, where there is more than one bag we assume that one bag is filled before a second one is used; but this does not always hold good, as we might dispatch mail to a point where there was not enough to fill one bag.

Q. You could load a bag with certain articles that would make it weigh several times as much as others might weigh?

A. Yes.

Q. You stated that the so-called subsidiary contracts of the Government of the Philippine Islands had with interisland carriers was not made for the purpose of paying for transportation of mails?

(I object to that as not being the best evidence, as the contract is explicit itself.)

(Overruled.)

(Excepted.)

24 Q. Was the subsidy granted by the Government under a contract?

A. Yes.

Q. These contracts state the conditions upon which these subsidies will be payable to the carrier?

A. Yes.

Q. Have you a copy of one of these contracts?

A. We might have, but that is handled by the Bureau of Navigation and by the Bureau of Customs.

Q. Is it not a fact, Mr. Masters, that during the seventeen years of your service in the Philippine Government that no direct compensation has been paid for the carriage of mail?

A. On interisland steamers between ports of the Philippine Islands.

Q. Is it not a matter of common knowledge and is it not a fact that prior to American occupation interisland steamers carried mail free?

(I object to that question on the ground that the witness is not testifying of his own knowledge and on the further ground that we are not concerned with the laws of the Philippine Islands under the former sovereignty and under a previously existing bill of rights.)

Q. You are familiar in all respects with the work of the Coast and Geodetic Survey of the United States and the Philippine Government?

A. I would not say that I am.

Q. You are aware of the fact that the United States Government

and the Philippine Government maintain such a service, and, in a general way, the functions of that agency, are you not?

A. Yes.

Q. Do you know that Congress appropriated 65 per cent of the money and the Philippine Government the balance of the money for this service?

A. No; I could not say that I do.

Q. You at least do not know that it is not true?

A. No; I cannot state just what the conditions are under which this service is operated, other than the United States Government pays part and the Philippine Government pays part.

Q. You traveled all over the Islands on interisland steamers and are more or less familiar with the conditions of the ports of call?

A. I used to; but I have not been outside of Manila since 1903, so I cannot say that I am. Before that I traveled a great deal, in fact, all the time; but that was thirteen years ago and my knowledge would not be uptodate.

Reëxamination by Mr. Cohn:

Q. You know, Mr. Masters, that the city of Manila maintains a police force that is paid out of the municipal funds and that one of the functions of this police force is to prevent the theft and robbery of merchandise from retail merchants on the Escolta?

R. Yes.

Q. You know also that the city of Manila maintains a fire department that is paid out of the municipal treasury and whose function it is to prevent and diminish the loss by fire in the city of Manila, and for the protection generally of its inhabitants?

A. Yes.

Additional cross-examination by Mr. Gerkin:

Q. You are also aware of the fact that the police department of the city of Manila and the members of the fire department are carried by a public utility, known as the Manila Electric Railroad and Light Company, free of charge, are you not?

A. Well, I have read something to that effect.

Mr. Cohn: This is provided for by a clause in the charter of the Manila Electric Railroad and Light Company?

A. I suppose so. I might also say that it is also the custom in most cities of the United States to carry mail carriers free, but they don't do that here.

Mr. Gerkin: Is it not a fact that the charters of the two railroads in the Philippine Islands—the Manila Railroad and the Philippine Railway—provide for the payment for the carriage of mail?

A. I cannot say just how it reads. An agreement was entered into between the railroad company and the Director of Posts, and such an agreement was duly signed.

Mr. Bonsal: You mentioned the figure 81,000 bags, and I did not quite catch what that was.

A. It was the number of bags of mail carried by interisland steamers—the mails received by the Manila office from other outside offices and carried by interislands steamers.

Q. That has no reference to the railroad mail whatsoever?

A. No.

26 Q. You stated certain figures in regard to mail carried by the Manila Railroad; does that apply also to the southern lines which have been built under a Government guaranty.

A. The same rates prevail.

Q. Do they also apply to the Philippine Railway?

A. Yes; the Cebu and Iloilo railroads as well as the Manila railroad extensions.

Mr. Cohn: Is it not a fact that the Philippine Government guarantees certain income upon bonds or capital invested in the two railroad- here?

A. That is my understanding.

Q. Is there any such arrangement with the steamship companies?

A. Not that I know of.

That is all.

UNITED STATES OF AMERICA,
The Government of the Philippine Islands:

(Before the Board of Public Utility Commissioners.)

[Case No. 781.]

Manila, May 25, 1916—a. m.

Before the Chairman, Honorable Mariano Cui; Member, Stephen Bonsal.

The Chairman: This being the date and hour set for the hearing of this case, Mr. Chester J. Gerkin appeared for the Director of Posts and Mr. Chas. C. Cohn for the respondent companies.

The Chairman (to Mr. Gerkin): Have you anything to say before the Board or any evidence to offer?

Mr. Gerkin: I have no evidence to offer. I merely wish to pray the Board to issue an order directed to certain steamship companies which, through their attorney, have given notice that from and beginning June 1 they will refuse to carry the public and official mails unless a remuneration be paid them. In order to save the interested steamship companies and the public from trouble, the Director deems it proper to bring this matter to the attention of the Board of Public Utility Commissioners before the date set for the discontinuance of the existing mail service, wherefore I pray this Board to issue

27 an order commanding these public utilities to obey the law relative to the subject. This is all I can say in connection with the case.

The Chairman: As the counsel for the Director of Posts has no evidence to offer, it now devolves upon the respondents to offer evi-

dence, to state what he may deem convenient, or to present evidence.

Mr. Cohn: The respondents have filed an answer to the complaint filed by the Director of Posts, stating several facts with the object of showing that the service required by the Government from the respondents is very considerable, so that this question may be decided in the courts, under the rule of minimus non curat lex. These facts are contained in paragraphs 2, 3, 4, and 5 of the answer, and unless the petitioner is ready to admit these averments as true, I beg the privilege of presenting witnesses to prove said allegations.

The Chairman (to Mr. Gerkin): The answer in the record contains some allegations in paragraphs 2, 3, 4, and 5; can you come to an agreement with respondents regarding those allegations?

Mr. Gerkin: I do not object to the facts contained in these paragraphs; however, there are some conclusions of law which we would not accept. The principal fact to the effect that there is no remuneration paid, that no provision is made for whatever kind of remuneration—that we admit.

(At this moment, the Acting Director of Posts arrived and gave testimony. As his testimony was given in the English language, his deposition was taken by the English writing stenographer of this Board.)

Testimony of JOSE VILLAVICENCIO, 36 years of age, married, mariner, who, after being duly sworn, testified as follows:

Mr. Cohn: Where are you employed as mariner?

A. At present in the Compañía Marítima, as captain of the steamship Romulus.

Q. How long have you been a captain of the steamship Romulus?

A. Since June of last year.

Q. Please state concisely your experience and training before that date.

28 A. As captain of the Del Carmen, Bolinao, and Ascensión; as first mate of the Cebú, Islas Filipinas, and many other steamships.

Q. Since when are you a sailor?

A. Since 1903.

Q. Are you personally acquainted with the conditions of the ports of the Philippine Islands?

A. Not all of them; but I am acquainted with those to which I have made trips only.

Q. State the ports that you personally known.

A. From Manila to the north, I know the lines of the north; the Mindanao line; the Visayas line—Tacloban (Leyte), Panay, Cebu, Negros; and the line of Albay—Tabaco, Virac, Nueva Cáceres, Mauban.

Q. When you say that you know those lines you have mentioned, do you mean to say that you know the ports of call in those lines?

A. Yes, sir.

Q. Do you know, for instance, the port of Dumaguete?

A. Yes, sir; I am making trips to that port for more than a year now.

Q. State at what distance from the shore is the anchoring point of the port of Dumaguete.

A. We anchor at about three-fourth mile from the seashore.

Q. Can you anchor at such place all the year round?

A. When the northerly winds blow, no; we usually steam to a point further north.

Q. What is the distance between that anchoring point at the north and the seashore of Dumaguete?

A. From the point up to the storehouse of the agent of the Compañía Marítima, I believe there is a distance of about half a kilometer.

Q. Is the storehouse situated in the vicinity, in the neighorhouse of the post office?

A. No; it is further away; about half a kilometer more.

Q. So that the anchoring point to the post office there is a distance of——

A. About 1 kilometer, more or less.

Q. About what portion of the year does the wind blow northeasterly in Dumaquete?

A. From September, October, November, December, January, February, March; in March the southeast blows there also.

Q. What means exist in Dumaguete, if any exist, for
29 transporting the mails from the steamer to the town of Dumaguete?

A. We always lower a launch to take the mails.

Q. Do you mean to say that you inconvenience yourself by using the launch of the steamer?

A. Yes sir; the postmaster has no vessel and we always have to lower a boat to transport the mails.

The Chairman: And at what place does the postmaster of Dumaguete receive the mails?

A. At the office; sometimes at the office of the agent and at other times in his own office.

Q. Please state, Captain, if in the port of Dumaguete, and by reason of the winds prevailing in that place, it is necessary for you, sometimes, to change the time set for the departure of the vessel by sailing ahead of time or late?

A. Sometimes when we are ready to leave Dumaguete at 10 o'clock, for instance, I announce the hour of sailing as half past 10; and many times when we are all ready the postmaster would order me to retard our sailing so as to give him time to get the mail ready, and in that way we are retarded.

Q. When you near the port of Dumaguete, do you usually fix the hour of departure in advance?

A. We let it be known to our agent so that he may notify the postmaster.

Q. By telegraph?

A. Sometimes by telegraph; at other times, no.

Mr. Cohn (continuing): Please state whether it is always possible

to determine (in advance) the hour at which the vessel would be ready to sail?

A. The fixed hour, not always.

Q. That is to say, that sometimes you are ready before the hour fixed and sometimes after that hour?

A. Yes, sir.

Q. In those cases in which the work of loading and unloading is finished before the time alloted, or when the work is not done within such time, what means do you employ to let the postmaster of Dumaguete know the change of time of sailing?

A. I send the supercargo (quartermaster) to notify the agent and he in turn notifies the postmaster.

30 Q. Please state whether, by being compelled to send the errand to the postmaster, the ship's movement is prevented—that is to say, if you did not have to notify him of the change of the hour of departure, could you sail before the scheduled time or retard the ship's sailing by doing so? (I withdraw the question.) Please state, Captain, whether or not it is true that by being compelled to notify the postmaster of the change of the time of departure of the vessel, it sometimes inconveniences and retards the sailing of the steamer?

A. Of course, it retards the sailing as we have to wait for the mails.

Q. Do you know the port of Cotabato, in Mindanao?

A. Yes, sir.

Q. Please state how long does it take to communicate from the anchoring place at Subaco to the post office of Cotabato?

A. The steamers do not steam up to the pier because steamers cannot navigate the river; and they usually anchor at the buoy, and from this place, when we are steaming against the current, we employ sometimes more than half a day; when the current is with us, one hour or one hour and a half.

Q. Do you mean to say that in case you have to notify the postmaster at Cotabato of the change of the hour of departure, even though under ordinary circumstances this change may mean one hour only, you would be compelled to change the scheduled time half a day, just for the purpose of notifying the post office?

A. Yes, sir.

The Chairman: Would you have to notify the post office of half an hour's delay in your sailing?

A. Yes, sir.

Q. How long before the departure of the vessel must the mail be on board?

A. Half an hour.

Q. Suppose that you announce the sailing at 10 o'clock and by reason of the loading and unloading you have to delay your departure twenty minutes, would you have to notify the post office thereof?

A. We have to notify the agent, and he in turn, I think, must notify the postmaster. This takes place only during office hours—from 8 o'clock to 12 and from 2 to 5; at night there is no one at the post office.

Q And even though you should sail——
A. There is no necessity.
31 Mr. Cohn (continuing): Do you know the conditions of the port of Iligan?
A. Yes, sir.
Q. Please state whether the conditions in this port are about the same as those already stated by you?
A. The same as those of Dumaguete—gales from the northeast.
Q. Do you know the port of Vigan?
A. Pandan, the port of Vigan; yes, sir.
Q. What is the distance between the anchoring place at Vigan and the shore of Pandan?
A. Half a mile.
Q. What is the distance between the shore of Pandan and the post office of Vigan?
A. Half an hour in carromata [light vehicle drawn by one horse].
Q. A distance of 3 kilometers?
A. More than 3 kilometers.
The Chairman: Aren't there barangayanes [boats after the style of the canoe] charged with receiving the mails at Pandan?
A. No.
Mr. Cohn (continuing): Do you know the port of Calbayog, Samar?
A. Yes, sir.
Q. Are your statements applicable to this port?
A. It is much beat by southeasterly winds.
Q. Carigara, Leyte?
A. The same, when the northeasterly wind blows.
Q. Calbayog, Samar?
A. Southeasterlies.
Q. Gasan, Marinduque?
A. Beat by the southeasterlies.
Q. The port of Iba, Zambales?
A. Beat by the southeasterly winds.
Q. The port of Ibahay?
A. By the northeasterly winds.
Q. The port of Lemery, Batangas?
A. Southeasterly winds.
Q. Lucena, Tayabas?
A. By the southwesterly winds.
Q. Maasin, Leyte?
A. Southeasterly.
Q. Malita, Davao?
A. Northeasterly wind.
Q. Mambajao?
A. Northeasterly wind.
Q. Nato?
A. Southwesterly.
Q. Ormoc?
A. Southwesterly.

Q. Salomague?
A. Southwesterly.
Q. San Pascual, Burias?
A. It is protected.
Q. But the anchoring place is far from the post office of the port of San Pascual?
A. Yes, sir.

32 Q. And at that port is it necessary to use the boats of the steamer in order to take the mail?

A. Yes, sir.
Q. And Santa Cruz, Davao?
A. In time of the northeasterly and northern winds.
Q. And Sibutu, island of Sibutu?
A. There the danger is in the current.
Q. And does this current delay the communication between the boat and the post office?
A. Yes, sir; because oftentimes the steamer's boat disappears.
Q. Baybay, Leyte?
A. It is beaten by the southwest monsoon.

That is all.

Mr. Gerkin: According to the rules of navigation, the boats are compelled to give especial notice of their calls which they make, in other words, is it not true that all the interisland boats make out their own route and time schedules without any suggestion from the Government?

A. I can not answer that question.

The Chairman: That is to say, that if in making the time schedule of the ship the Government should suggest that you sail at a certain hour or at another?

A. I have not received any suggestion from the Government on the question of calls and departures, having received instructions from my shipowner only.

Mr. Gerkin (continuing): You say that the offices of your shipping agent are located at a certain distance from the anchorage of the steamers; is it not true that these offices are almost adjacent to the post office in the ports to which you refer?

A. Some of them are not and some of them are, depending upon the locality.

Q. During the thirteen years that you have been sailing on the waters of these Islands, have you observed many changes and improvements in the navigating conditions; if you can state, please state, who introduced these improvements, whether the steamship owners or the Government?

A. I have noticed many improvements, such as the establishment of lighthouses for the guidance of steamers and shipowners.

Q. Are you familiar with the services rendered by the

33 Geodetic Survey Commission of the Government of the United States in the Philippine Islands?

A. Yes, sir.

Q. Do you know whether or not the Government of the United States appropriates money to defray the expenses of steamers and personnel to maintain this service?

A. I know nothing about this.

Q. This is a matter of general knowledge. Do you know whether or not the Government of the United States advances money to railroad companies for maintaining their lines?

A. I am not appraised of that fact.

Q. Do you know whether or not that for some years the Philippine mail has been carried by coastwise steamers free of charge?

A. I knew that formerly they were paid a subsidy; but as to the present time I do not know; so much so, that at one time we were compelled to wear uniforms, because certain steamers were subsidized and the officers of those steamers that were not did not have to wear uniforms. I do not know whether such subsidies are still being paid.

Q. Was this during the Spanish or American regimé?

The Chairman: Were you a mariner during the Spanish regimé?

A. No sir; I have been since 1903 only.

Mr. Gerkin (continuing). But do you know what this subsidy was for?

A. We were informed that it was for carrying the mail; but I can not state positively what it was for; it is simply a matter of hearsay.

Q. Don't you know that it was for inducing the steamers to call at ports which otherwise were not convenient for them to call on account of cargo conditions?

A. I do not know.

Q. Since this subsidy was eliminated, have the steamship companies cut out any of the ports where——

A. I can not tell you, because our shipowners have not informed us of this fact.

Q. Who told you that the Government paid this subsidy for the carriage of mail?

Mr. Cohn: I object to the question. What difference will it make here as to who told the witness this fact?

The Chairman: I believe that the condition of the subsidy should be proven by the existing contracts, which would establish
34 this point; and I believe that it is unnecessary for the record to show this fact.

Mr. Gerkin: I will not insist on an answer, but I want my question to stand on the record. And that is all.

Mr. Cohn: One question: Speaking about improvements in the conditions of the navigation, please state who were benefitted by such improvements—whether you, the shipowners, the passenger, the shippers, the insurance companies, or who?

A. As to the improvements such as light-houses and charts, the mariners.

Q. And the passengers? If a lighthouse has saved the lives of passengers, do you believe that they were thereby benefitted?

A. Of course they have been.
Q. Do you not believe that consignees of cargo——
A. Likewise.
Q. Do you not believe that insurance companies also?
A. Yes, sir; all.

The Chairman: Has the establishment of lighthouses greatly facilit-ed navigation?
A. Yes, sir.

Testimony of PEDRO CLAPAROLS, of legal age, manager of the shipping department of the Compañía General de Tabacos de Filipinas, residing at Manila, who, after being duly sworn, testified as follows:

Examined by Mr. Cohn.

Q. How long have you been working in the steamship department of the Compañía Tabacalera?
A. Three years.
Q. Are you familiar with the conditions that prevail at certain ports in the Philippine Islands, as regards the distance between the anchorage of steamers at said ports and the post office?
A. Of my own personal knowledge, no, because I have not been in any of those ports; but I have received information from the masters of our steamers of such conditions.
Q. Perhaps you can state, Mr. Claparols, by what means the mail at Vigan is transported from the steamer to the beach?
A. At the port of Vigan, owing to the long distance, we cannot transport it in our lifeboats because it would require many rowers and it is transported by "barangayaness," which cost us 20 centavos per bag of mail and besides the agent of the steamer charges to our account the "carromata" bill.
Q. Can you state what was the amount paid by the Compañía for the transportation of the mails from its steamers to the shore during the year 1915?
A. According to the bills presented to us by the agent, it amounted to ₱228 at the port of Vigan alone. We have also paid some expenses at the ports of Salomague and Aparri, but not so much.
Q. At the ports where it is necessary to use the lifeboats of the steamer or its gangway planks, is it possible to determine with accuracy the amount for such services?
A. No, sir; because in that case it would be necessary for us to keep an exact account of labor and we do not keep such an account.
Q. Then, this figure—in relation to Vigan—is due to the fact that the labor was done by other person?
A. Because we estimate that it would cost us less.
Q. What can you state, in a general way, of the effect upon the movements of the steamer of the necessity of notifying the postmaster of the hour of the ship's departure and of any change of the hour of departure?
A. In the northern ports, where the shores are very distant from

the anchorage, we are very often handicapped, because we cannot estimate beforehand the time it will take the boat to load and unload, so that in many cases it is estimated that it will take half a day, when as a matter of fact one hour would be sufficient; but inasmuch as the postmaster has been notified, the boat is held up for many hours having to wait until the hour previously announced.

Q. Do you know what would be the consequences of a steamer sailing ahead of the time as announced to the postmaster of any port?

A. A fine, a punishment for the master, which may cost him his license.

Q. Have such cases ever occurred?

A. Not during my incumbency, as far as I can remember, because we have been very careful in complying with the regulations. However, there have been cases where the Bureau of Posts has held us responsible for the loss of bags containing mail and money, and compelled us to make good such losses.

The Chairman: When did this happen?

A. I do not remember; but we have paid for one bag con-
36 taining registered mail which had been miscarried.

Q. How much did you pay?

A. A small amount—₱60 or ₱50; and that is why we paid—a year ago.

Q. Was the steamer subsidized?

A. I do not know; but if the Board so desires I can bring the data.

Q. Do you maintain in this line steamers subsidized by the Government?

A. I do not remember; but a short time ago there was another case here in Manila wherein a sack containing silver bullion fell into the river and it was fortunate that it was noticed by some fishermen; and the Director of Posts called out attention for our carelessness, when, as a matter of fact, the fall was due to the bad condition of the hooks of the sack.

Mr. Cohn (continuing): Please state if money in coin and in paper is frequently transported through the mails in the Philippine Islands?

A. Registered mail is carried on every trip, and on various occasions sacks containing silver coins are also carried.

Q. Please state if the Compañía General de Tabacos de Filipinas has at any time agreed to carry mail without compensation?

A. Up to the present we have been so carrying it, notwithstanding our protests.

Q. Have you always so carried the mail under protest?

A. Yes, sir.

The Chairman: In writing?

A. Orally.

Q. By the firms?

A. Yes, sir.

Mr. Cohn (continuing): Is the Compañía a member of the shipowners' Association?

A. Yes, sir.
Q. Do you know that for some years now there is pending in the Supreme Court a litigation looking toward the abolition of the compulsion to carry mails without charge?
A. Yes, sir.

That is all.

Mr. Gerkin: How did you find out the amount paid at Vigan for the transportation of mail?
A. I have seen the accounts of our agent.
Q. Did you use the services of new assistants for this purpose?
A. I did this personally; I looked over the accounts and
37 made a total of the amounts paid which gave me this result.
Q. You do not trust the mail to strangers, but leave it in charge of one of your employees, isn't that so?
A. I do not receive nor handle any mail.

That is all.

The Chairman: How many steamers has the Compañía now on the northern line making Vigan a port of call?
A. Two; the Isadoro Pons and the Compañía de Filipinas.
Q. Is any of these steamers subsidized by the Government?
A. At present, the Compañía de Filipinas,—that is, since the 1st of May we have entered into a contract; it is subsidized for the calls at Tagudin and Santo Domingo de Basco; and as to the other calls en route, it is optional with us. And the subsidy does not cover all the trips of the ship, but only once a month; the ship makes two or three trips per month and only one trip is subsidized.
Q. In these two monthly trips of the Compañía de Filipinas, does she always call at the port of Pandan?
A. Whenever the weather permits.
Q. And when the weather does not permit, where is the mail discharge?
A. At Salomague.
Q. And who pays the expenses for transporting the mails from Salomague to the post office?
A. I do not know.
Q. Does it not appear on the accounts?
A. There is no post office at Salomague.

That is all.

Mr. Gerkin: You have just now stated that sometimes the sailing of steamers is held up; to whose fault is that due—the fault of the postmaster or of the agent?
A. Generally, the delay is due to force majeure, on account of the weather or of the cargo.
The Chairman: Then it is not due to the fact that the postmaster has not dispatched his mail in time?
A. As a general rule, no; though it could happen.
Q. If the postmaster does not have the mail ready half an hour

before the time fixed by the agent for the sailing of the boat, can the steamer depart?

A. I am not aware of anything that happens outside of Manila, as I have never been out of the city.

38 Mr. Gerkin: Are the steamers that you have been talking about tramp steamers or are they regular liners?

A. They are regular weekly line steamers.

Q. Do you notify the Director of Posts that the ship will sail at a certain given hour?

A. We always notify the Director of Posts that the steamer will depart at a given hour; and, although it may be ready to sail before that hour, it has to wait.

Q. Do you have the duty to notify also the passengers of the boat as to the hour of sailing?

A. Certainly.

Q. Is there any port in the Philippine Islands where you could not notify the postmaster within a few minutes' time?

A. I have said before I can not say anything of what happens in the provinces, as I have never been out of Manila.

Mr. Cohn: Referring again to the delay in the departure of the boats, please state whether it is due to somebody's fault, or to the need, to the duty of giving notice to the post office regarding the hour of sailing?

A. The delays in the sailings, I think I have already said, are due sometimes to the conditions of the weather; other times to the work of loading; and at others, though not as a general rule, to waiting for the mail.

Q. Let us take a concrete example: Let us suppose that before arriving at Vigan it is estimated that the task of loading and unloading will last four hours and the hour of departure is set for 2 o'clock in the afternoon of that day, and having finished with the loading and unloading and with all the passengers on board the ship at 12 o'clock and with a threatening weather, the boat could sail at that very moment were it not because of the duty to notify the post office of the change of the hour of sailing and therefore the steamer can not sail?

A. Yes, sir.

Q. So that the handicap in the present system is not anybody's fault?

A. Yes, sir.

Q. And is due only to that duty of notifying about the change of the hour of departure?

A. Yes, sir.

Q. Another concrete case: If the work of loading and unloading is not finished within the time previously estimated and it

39 appears that it will take half an hour more, the exact time for the ship's departure is not based upon the time necessary for loading the ship but on the time it would take to notify thereof the postmaster?

A. That is the duty.

That is all.

Mr. Gerkin: Do you know of any case where the departure of a vessel has been delayed on account of having to give notice to the postmaster of the hour of sailing?

A. At this moment I could not tell, as I would have to look up the data.

Q. That duty of notifying the post office is not sustained by any fact in your possession?

A. I would have to ask the data from the ships' masters and from the agents.

That is all.

Testimony of JOSÉ F. FERNANDEZ, 45 years of age, merchant, residing at Manila, and a member of the firm Fernandez Hermanos, who, after being duly sworn, testified as follows:

Examined by Mr. Cohn:

Q. In what class of business are you engaged?

A. General: Maritime, purchase, and sale.

Q. And has your business anything to do with the navigation of coastwise vessels in the Philippine Islands?

A. Yes, sir.

Q. In regards to that, what steamers?

A. We have seven steamers plying in the Philippine Islands—five of La Marítima and two of Fernandez Hermanos.

Q. And how long have you been the manager of those seven vessels?

A. The steamship Fernandez Hermanos is owned by us since 1905, the Filipinas since about 1906 or 1907, and the Marítima steamers since 1912.

Q. You have heard the testimony of the previous witnesses regarding the importance of the service rendered in the Philippine Islands by steamships in the transportation of mails, and also regarding the difficulties of such service?

A. I have only heard part of the testimony of the Captain, at the time when I arrived.

Q. Have you heard the testimony of Mr. Claparols?

A. Yes, sir.

40 Q. Please state whether you corroborate the statements of that witness?

A. Yes, sir.

Q. Do you wish to add anything to what has been already said?

A. Yes, sir.

Q. Please state, in a general way, if you can, the largest amount of mail transported from Manila to Iloilo in a single trip.

A. I can not state it, because we have no steamer on that line.

Q. From Manila to Cebu?

A. I can not either, because we did not look into that; that is cared for by the ship's officers; all we do is to clear the vessel.

Q. Please state whether you or your firm has at any time con-

sented to voluntarily transport the Philippine mail on board of your steamers free of charge?

A. No, sir.

That is all.

Mr. Gerkin: From your own experience, will you state whether the necessity of giving notice to the Director of Posts has resulted sometime in any difficulty in the movement or departure of a vessel?

A. In Manila itself, no, because there are many facilities in Manila for that purpose, and the Bureau of Posts has enough personnel to attend to that; it can afford to have somebody ask from our office for the hour of departure of our vessels; sometimes, though, when we are compelled to retard, for example, one hour of the sailing of the vessel, then we notify the post office of the delay of the departure and we can not let the vessel sail before the hour we notified the post office.

The Chairman: Suppose, Mr. Fernandez, that the vessel is scheduled to sail at 12 o'clock, but later more cargo arrives and the loading is finished at 2 o'clock; would there be necessity to notify the post office of such change of departure?

A. We notify the post office.

Q. I will tell you a case that happened with me when I made a trip on the steamship Belgika; I went on board at 12 o'clock because the captain told me that the boat would sail at 12 o'clock sharp, but it happened that more cargo began to arrive and the vessel was not able to sail until about 2 o'clock; I asked the captain: "At what time shall we sail?" "I can not tell you; we will sail when the loading is finished."

41 A. We notify the change of hour of sailing when we can tell, more or less, the time of departure; but when we can not, then we open the steamer's mail box to receive the tardy letters, because according to instructions from the post office we are not to open the mail box until half an hour before the sailing of the vessel, during which time the mail to be transported is already closed.

Mr. Gerkin: Is the notice that you give the post office different from that which you give the passengers and shippers?

A. No, sir, it is the same one.

Q. The Government has always put at your disposal the use of the telegraph and the telephone to transmit the hours of departure, hasn't it?

A. The telephone, yes; but not the telegraph; here we never use the telegraph in order to communicate with the Bureau of Posts.

Q. When — address the Directors of Posts, you do not pay anything?

A. I did not know we could use the telegraph free of charge in order to communicate with the Director of Posts; we did not receive orders to that effect.

Q. By the trips you have made on your vessels, do you know the conditions of your steamship lines?

A. Some lines, yes.

Q. You must have probably noticed the improvements introduced for the navigation and the commerce of the Philippines during the American occupancy?

A. I noticed it.

Q. Have the shipowners defrayed the expenses, or some of the expenses, of those improvements?

A. The improvements relate only to lighthouses, and this has been noticed by travelers on sea.

That is all.

The Chairman: Will you state whether at any time or at any place it had cost you money to transport the mails?

A. Yes, sir; it is an expense to us.

Q. Where is it an expense to you?

A. For instance, at Cebu, where we have to pay ₱10 monthly to carry the mail from the steamer to the post office.

Q. At other points?

A. No; because the transportation from the steamer is done by our own laborers.

Mr. Cohn: Please state if you use the steamer's lifeboats to
42 transport mails from the steamer to the shore, or to the post office; can those boats be utilized for the work of loading and unloading?

A. To carry the mails.

Q. You mean to say that the people employed to carry the mail cannot be used for unloading the ship?

A. Yes, sir; and there is less space in the boat for the cargo and for the passengers, and oftentimes at the port of Calbayog, according to statements from the masters of vessels, they must, of necessity, call there even during the southwesterly monsoons—because they cannot load and unload—and though they could not the vessel must anchor to land the mail.

Q. When you say that, except for the port of Cebu, the trnasportation of the mail does not cost you any money, you mean to say——

A. That we spend no money, but that we perform work, which, in some sense, means money.

Mr. Gerkin: Have you noticed that at the port of Cebu, where you take a great amount of mail, you also take much freight and passengers, or, in other words, there is a relation between the mail received by a community and the commercial activity thereof?

A. It is true that we take a lot of freight and passengers, but that is so only when we transport it without compensation. Formerly, Cebu was also pecuniarily compensated, and later the Government entered into a contract with us for the Cebu mail and giving us the government freight, though that is not true now, because Government freight is loaded in different boats.

Q. Is the carrying of the mails free of charge more burdensome than that suffered by the Manila Electric Railroad Company which has to render free transportation service for the members of police and fire department?

A. I believe that we, the shipowners, have nothing to do with the

other companies; and we are only stating the damages that result to us; if the other companies accept the burden, good and well.

That is all.

Testimony of JUAN MARIA POIZAT, merchant, 3 Plaza Moraga, Manila, who, after being duly sworn, testified as follows:

43 Mr. Cohn: You have heard the testimony of the previous witnesses?

A. Yes, sir.

Q. Regarding the importance of the service now under consideration?

A. Yes, sir.

Q. And of the difficulties attached to that service?

A. Yes, sir.

Q. Do you wish to corroborate those statements?

A. Partly.

Q. What parts don't you wish to corroborate?

A. Those that I do not know about personally.

Q. Do you know, in general terms, the importance of the service?

A. Yes, sir.

Q. And do you know the difficulties inherent with the existing regulations?

A. Yes, sir.

Q. Now, you have no personal knowledge about those details?

A. Of some.

Q. Have you anything to add to the statements of the previous witnesses?

A. Nothing.

Q. Are you a shipowner?

A. Yes, sir.

Q. Of what steamers?

A. Of the steamships Gabriele Poizat, Roger Poizat, Charles Poizat, and Antonio Poizat.

Q. As shipowner of those steamers, have you consented at any time to voluntarily transport the Philippine mails free of charge?

A. No.

The Chairman: Have you any steamer subsidized by the Government in order to carry the mails?

A. For Corregidor and Antonio and Charles Poizat.

Mr. Cohn (continuing): Who pays that subsidy?

A. The military government of the United States.

That is all.

Mr. Gerkin: Is a considerable part, the greater part, of the Government mail taken here by Government coastguard cutters?

A. Very little, if there is any.

That is all.

The Chairman: Does it cost you money to carry the mails?

A. Yes, sir.

Q. At what points?

A. At Dumaguete, for example.

Q. What does it cost you?

A. I do not have the figures at hand, but it entails an expense for me; the same happens at Iligan.

44 Mr. Bonsal: Can you furnish the bills of such expenses?

A. Yes, sir.

The Chairman (continuing): At what port does it cost you most to transport the mail?

A. I can not tell that off hand, because the masters of vessels are the ones that send in the bills for carromatas, etc.

Mr. Cohn: Do you mean to say that at those ports you directly have to spend money to pay people not under your employ?

A. Yes, sir.

Q. And at other ports?

A. For our expenses.

Q. And does it cost you any?

A. The pay for our men.

Q. And for the delay of the ships, for sending the notice to the postmaster, does it cost you money?

A. Yes.

Testimony of JULIO GONZALEZ, 40 years of age, married, employee of the firm Ynchausti & Co., of this city of Manila, who, after being duly sworn, testified as follows:

Examined by Mr. Cohn:

Q. That firm of Ynchausti & Co., is it the owner of any ships?

A. At present we have the Vizcaya, the Sorsogon, and the Pitogo, which are coastwise steamers, and we have several others.

Q. Have you heard the testimony of the witnesses preceding you?

A. Yes, sir.

Q. Have you heard what they stated of the importance of the mail service and the difficulties inherent thereto?

A. Yes, sir.

Q. Do you wish to corroborate what was stated by the other witnesses about those particulars?

A. Yes, sir; in general terms.

Q. Can you state, Mr. Gonzalez, the greatest amount of mail ever transported from Manila to Iloilo at any one trip?

A. We have never thought of taking its measure; but, of course, we have seen two or three trips where the mail has taken a lot of space that we could utilize for freight.

Q. Did it ever reach 200 sacks?

A. It can be estimated that; sometimes it is more than 200 sacks.

Q. Can you tell us, by your experience, what are the consequences of not heeding the regulations existing; for example, the departure of a ship from a port without having given notice in advance of the change of hour of sailing?

45 A. We have received communications threatening us with fine, and to withdraw the license of the ship's master. It has been imposed upon us as a duty from which we could not escape. We have always observed it, though protesting.

Q. Has there been any instance in which Ynchausti & Co. has spent money for the defense of masters' licenses from such a threat?

A. I remember vaguely; it is now a long time.

The Chairman: Whose case was that?

A. I do not recollect exactly; but it seems to me that it was that of a ship's master who is not here any more.

Mr. Cohn (continuing): Is it Capt. Joaquin Villata?

A. Yes, sir. At present, for instance, we have two steamers—the one in the Iloilo run makes regular trips, and the other makes irregular trips, and the faster the service the more beneficial. Sometimes a time is set for sailing, and it results that it can sail earlier, but we cannot do it on account of the notice given the post office. This, of course, is prejudicial to us.

The Chairman: Does that excess of time occur many times?

A. Yes, sir. Because it is impossible to figure the amount of freight of any given trip. It is figured, for example, that it could sail at 4 o'clock in the afternoon, and it happens that on that trip there is but little cargo, so that the boat can sail at 2 o'clock, at 1 o'clock, yet it can not depart.

Q. Can't it sail ahead of time?

A. No; because the post office has arrange- things for that hour.

Q. So that in most cases that is due to your erroneous calculation?

A. We can not compute the time exactly in irregular trips, for that depends upon the shippers. In regular trips, the exact hour can be calculated.

Q. At ports of call, does not the master of the ship fix the hour for sailing?

A. Yes, sir.

Q. Then he can fix the hour of departure almost exactly?

A. Sometimes it can not be determined exactly.

Mr. Cohn (continuing): The system most generally used is by telegraphing from the last port of call so that the master may compute the time, isn't it?

A. Yes, sir.

46 The Chairman: That telegram is——

A. To give the hour of arrival and departure.

Q. So that the hour of arrival and of departure is determined from this place (last port)?

A. But I have said that we can not always guess it correctly, as it depends upon the loading and unloading to be done.

Mr. Gerkin: What comparison do you make out of the present time and the past regarding the income and other circumstances of the business?

A. I had to say it sometime: It is true that nowadays the income is greater, if you want to take that way—that is my own conviction; but the expenses are also greater.

Mr. Cohn: Isn't it true that there has been pending in the Supreme Court for almost ten years—I withdraw the question.

Mr. Gerkin (continuing): Have you ever thought in what way a remuneration could be paid for carrying the mail?

Mr. Cohn: I object to the question as immaterial.

The Chairman: Objection sustained.

Mr. Gerkin: That is all.

The Chairman: On steamers in the Iloilo run, could you cite an instance where freight had to be rejected for the purpose of allowing enough space for the mail?

A. I do not know of any such case. It is now four years that a large steamer is in that run; but formerly, when the steamer was a small one, yes.

Q. But it was subsidized then?

A. Yes, sir.

Q. How long ago is it that the subsidy was withdrawn?

A. At least three years. I well remember that it was on July, 1903.

Q. But long before the subsidy was withdrawn, Ynchausti & Co. had put a large steamer on that line?

A. In 1912, the Forbes.

Mr. Gerkin: Isn't it true that the indirect compensation that you receive and the direct compensation you ask has to be paid from the taxes paid by the people?

Mr. Cohn: I object as it is unintelligible, that indirect——

47 Mr. Gerkin: I am willing to strike out that word.

A. It may be possible; however, it is for the benefit of the people.

Q. Is there any citizen in the Philippines that is not benefited by the mail service?

A. That is undoubtedly true—that it is for the benefit of the people. Steamers also pay a license for navigating. That lighthouse service rendered by the Government is indirectly compensated by what is paid by the steamers, etc.

Mr. Cohn: All of that is argumentative, Mr. Gonzalez.

Mr. Gerkin (continuing): If this service were paid for, would not the shipowners take this fact in connection with the cost of freight and passage?

Mr. Cohn: I object, as trying to ask a conclusion of law.

The Chairman: Objection sustained.

Mr. Gerkin: That is all.

Testimony of ENRIQUE BIEL, 35 years of age, married, mariner, residing at Manila, who, after being duly sworn, testified as follows:

Examined by Mr. Cohn:

Q. On what boat are you now serving?

A. On the steamship Compañía de Filipinas.

Q. How long have you been navigating on Philippine waters?

A. Since 1901.

Q. Do you know the conditions of the ports of the Philippines?

A. Most of them; not all.

Q. Have you heard the testimony of the preceding witnesses in this case?

A. Yes, sir.

Q. Do you wish to corroborate their testimony regarding the importance of the mail service and the difficulties arising out of the existing regulations governing same?

A. Yes, sir.

Q. Do you wish to state anything further about the present-day difficulties of the service?

A. Yes, sir; that in boats like the one where I am now working, which have no appropriate room for the mail, it is burdensome, for many times heavy sacks are loaded (said to contain money) which are stored in the hold, and should they be lost, the loss is charged to us. We have to reserve space for the mail and many times
48 we have to reject freight to make room for the mail.

Q. Please state what are the consequences of sailing from a port without notifying the postmaster thereof of the hour of departure.

A. Something like that happened to me while I was at Bulan. I waited for more than two hours the delivery of the mail and seeing that it was not coming, I sailed. Upon arrival at Manila I received a letter from the Bureau of Customs inquiring why I had not brought the mail from Bulan, to which I answered that it was not my fault as for two hours I had been waiting for the mail at the shore; and that is how it ended.

The Chairman: So that the postmaster has to deliver the mail at the seashore?

A. When it is not contracted for.

Q. Therefore, you do not have the duty to carry it?

A. No; but oftentimes we deliver it to the ship's agent, and he in turn does the delivery.

That is all.

Testimony of CHARLES C. COHN, 40 years of age, married, attorney at law, residing at Manila, who, after being duly sworn, testified as follows:

I am and I have been one of the attorneys for the Shipowners' Association, and the private attorney for many of its members, for the last eight years. I desire to say that the question of the free transportation of mails in the Philippine Islands is not new, but that it is a question that has been raised by adequate proceedings ever since the promulgation of Customs Circular No. 627. The first opportunity that offered itself to raise this question was when the Insular Collector of Customs threatened a ship's master, Captain Joaquin Villata, to cancel his license for not having notified a postmaster at a

port of call of the change of the hour of departure of his ship. Founded upon this incident, we succeeded in obtaining from the Supreme Court an injunction prohibiting the Insular Collector of Customs and the Director of Posts from interfering with the said captain in the enjoyment of his license, just because he had omitted complying with a duty imposed upon him by a law that we considered unconstitutional as set forth in the allegations of that injunction case. From the moment of the filing of the case,
49 until the early part of this year, we prayed for a decision on the merits, though unsuccessfully, notwithstanding the diligence of the shipowners during the pendency of the case. At the beginning of this year the case was dismissed by agreement of both parties due to changes in the laws applicable, and in its stead different proceedings were instituted before the Board of Public Utility Commissioners which had been created while the case of Villata versus The Collector of Customs was still pending decision. And for the better presentation of the case and to facilitate the decision upon its merits, without hampering it with technical points, the later proceedings were also voluntarily dismissed, so as to bring up the present proceedings. The shipowners have, therefore, done everything possible, through their attorneys, to raise this question from the very beginning, and from the very start they never accepted this service without compensation. That is all.

The Chairman: Who begun, or who instituted, that Bellota case?

A. It was begun in the name of Joaquin Bellota by us who had been employed by the shipowners to defend the license of Bellota.

Q. Can you state the year when that case was filed?

A. With certainty, no, sir; but I am sure that it was pending on a demurrer in the Supreme Court for several years.

Q. Is that the only case filed and paid for by the Shipowners' Association?

A. Yes, sir; in filing that case, care was taken to present the question in due form and with the least inconvenience to the parties, as the law providing for the transportation of mail is of much importance to the public, to the Government, and to the shipowners; the case was conducted in such a way as not to cause damage, first, to the government, as until the Legislature should meet the service could not be substituted; then to the ship-owners, because in case the free transportation of the mails should be compulsory, their refusal would give rise to a disorder of some proportions.

Q. Doesn't the carrying of mail favor the shipowners, because if they should refuse to render such service they could not take merchandise nor bring freight?

A. Yes, sir; but as the service is a common benefit, I can
50 not see sufficient grounds for imposing the obligation; the cost of such service of common benefit must be borne by the public.

And with this testimony the case stand- as heard.

I certify that the foregoing is a correct transcription of the notes taken by me at the hearing of this case.

MANUEL BLANCO,
Stenographer to the Board.

UNITED STATES OF AMERICA,
The Government of the Philippine Islands:

(Before the Board of Public Utility Commissioners.)

[Case No. 781.]

In the Matter of the Complaint of the Director of Posts against the Shipping Firms Ynchausti & Co., Compañía General de Tabacos de Filipinas, J. M. Poizat & Co., and Fernandez Hermanos Concerning the Refusal of said Firms to Carry the Mails of the Philippine Postal Service on Their Vessels Free of Charge.

Decision.

These proceedings are with regard to a petition of the Director of Posts for an order compelling all and each of the shipping firms of Ynchausti & Co., the Compañía General de Tabacos de Filipinas, J. M. Poizat & Co., and Fernandez Hermanos, of the city of Manila, to comply with the law relative to the carriage of the mails of the postal service of the Philippine Islands, and to instruct the masters and agents of their vessels plying between ports of these Islands to continue accepting and carrying such mails on and after June 1 of the present year. The said petition is made in view of the attitude taken by said firms in refusing to carry any of the said mails on their steamers unless they be paid for this service, which attitude was brought to the knowledge of the Director of Posts by a letter of the attorneys of said firms dated May 14, 1916, said letter being indorsed to this Board by the said Director on the 9th, with the petition above referred to, and citing in support thereof section 309 of Act
51 No. 2657, made effective by proclamation of the Governor-General on March 1, 1916, and section 16, subsection (*a*), of Act No. 2307, as amended by Act No. 2362.

The aforesaid correspondence received from the Director of Posts of the Philippine Islands having been considered as a formal complaint, by resolution of this Board of May 10, 1916, a copy of the same was furnished to the shipping firms complained against and to their attorneys, for reply within four days' time. On the 12th the reply was filed, in which the following allegations are made: That the said defendants are and have been, and each of them is and has been, engaged in the business of common carrier, to wit: In the carriage of passengers and freight for hire between various ports of the Philippine Islands in vessels duly licensed for the coastwise trade in the Philippine Archipelago; that said defendants are now, and have been, required and compelled by the plaintiff and by the Collector of Customs of the Philippine Islands, under threat of the temporary

or permanent disqualification of the masters of said vessels, and otherwise, to render and perform, without payment, compensation, or reward therefor, certain arduous and costly services, and to wholly pay and defray the cost and expense thereof, namely, (*a*) the carriage of all mails of the Philippine postal service tendered for transportation, in a safe and secure manner and free from injury, by water between the ports of the Philippine Islands; (*b*) the giving of prompt advance notice of the intended sailing of said vessels to the post office at each port of departure in ample time to permit the making up of mails for dispatch; (*c*) the communication to said office of any changes in the sailings of such vessels; (*d*) the delivery of all mails so carried by such vessels at ports of call on shore or on a wharf immediately after arrival and prior to discharge or lading of any cargo, and the delivery thereof from shore or wharf to such vessels just before the vessels' sailing time; (*e*) the maintenance on said vessels of lock boxes to receive letters, papers, or other mail matter delivered on board after the mails have been closed at the post office for that particular voyage and the delivery of such mail matter, so
52 deposited on board, to the post office at a port of call of such vessels. That there has been instituted and inaugurated in the Philippine Islands, and there is now in full operation, a system of parcels posts whereby there is included in the mail matter of the Philippine Islands, additionally, sundry and diverse merchandise of important and increasing quantity and bulk, and consisting, in part, of articles similar to those which the said vessels have heretofore carried, and still carry, as freight for hire. That by reason of the free carriage of the mails, the defendants have been and are required to sacrifice unto such purpose a large and appreciable portion of the carrying space of such vessels, which is occupied by the mails so carried and which would otherwise be available for the carriage of freight for hire, and have furthermore been compelled to aid and assist, by free and gratuitous service, in an effective competition with their own business of common carrier. That at many ports of call of the vessels of said defendants, the necessary and proper anchorage of said vessels is situated at a considerable distance from the post office at such port and the means of communication and of travel between said anchorage and said post office are scarce, slow, costly, and grossly inadequate. That the said defendants have been, and now are, subjected to repeated and grave annoyances, trouble, and expense, and the vessels of said defendants have been and now are greatly hindered, hampered, and interfered with in the prompt dispatch thereof, by reasons of the facts aforesaid and by the requirement to communicate in advance the intended sailing hour of said vessels, or any change thereof, and to deliver certain mails at the shore or wharf before unloading the cargo of said vessels, and to deliver certain mail matter at the post offices of said ports of call, all to the grave loss and injury of said defendants. That the defendants have not, nor has either nor any of them, consented, agreed, or stipulated that the said vessels of defendants or any of them shall perform the free and gratuitous service hereinabove mentioned and referred to, but the

said services have been and are being performed by said defendants, at the sole and exclusive cost and expense of the said defend-
53 ants, under duress and under due protest by said defendants and each of them. That section 309 of Act No. 2657 of the Philippine Legislature and Customs Administrative Circular No. 627, under and by virtue of which the Director of Posts and Collector of Customs have been and are exacting from said defendants the requirements aforesaid, are unjust, unreasonable, and confiscatory in that the same would, and will if enforced, deprive said defendants and each of them of their property without due process of law, and deprive them of the equal protection of the law, and take the private property of said defendants for a public use without due compensation, all contrary to and in violation of the Constitution of the United States and the amendments thereof and to the Act of Congress of July 1, 1902, entitled "an Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands and for other purposes." And in conclusion the defendants pray that they be absolved from the complaint and that the same be dismissed.

The hearing of this case being held on the day and at the place previously designated, Mr. Chester J. Gerkin, assistant attorney of the Bureau of Justice, appeared on the behalf of the Director of Posts of the Philippine Islands, and attorney Charles C. Cohn for the defendants.

In the course of the hearing, Attorney Cohn introduced evidence tending to prove certain allegation of facts made in the reply filed by the defendants; but we do not deem it necessary to take up the result of said evidence, because we hold that in order to decide the question at issue within the authority of this Board, the uncontroverted fact of the refusal of said defendants to carry the mails of the Philippine postal service, as established in their letter to the Director of Posts of the Philippine Islands, on file with the record, is sufficient, and, further, the circumstance that the said defendants are, within the statutory definitions, public utilities operating in these Islands as common carriers by sea.

At its last special session, the Philippine Legislature passed Act No. 2657, section 39 of which, providing for the free carriage of the mails of the Philippine Islands was put into force and
54 effect on March 1, 1916, by virtue of a proclamation of the Governor-General of the same date. The section referred to, copied literally, reads as follows:

Contracts on behalf of the Insular Government with companies operating vessels engaged in the coastwise trade to secure the carriage of freight and passengers for the Government shall be executed by the Secretary of Commerce and Police, subject to such restrictions as may be prescribed by law; but vessels engaged in the coastwise trade and vessels plying between Philippine ports shall continue to carry mail free.

It will be seen that the provision of law above transcribed is clear and precise. The allegations of the reply filed by the defendants do not raise any question whatever relative to the ambiguousness

of this provision or its arbitrary enforcement, but simply assert that the same is a violation of the Constitution of the United States and of the "Philippine Bill," which is the Act of Congress of July 1, 1902. We hold that this Board is not competent to pass on the question raised, as the decision thereof necessarily involves the constitutionality of the portion of a law enacted by the Philippine Legislature, and this Board, as a special administrative body, lacks, in our opinion, the power to make such decision, for the reason that its functions are merely quasi judicial, those necessary to perform its special duties. To declare a law constitutional or unconstitutional is a function proper to the judiciary and is as such vested in the courts of justice. In support of this criterion we shall cite the doctrine laid down in a similar, not to say identical, case by the supreme court of Missouri, to wit:

Respondent disavows power to repeal a statute unconstitutional. That disavowal is correct. The repeal of the statute is a legislative act. To declare a statute unconstitutional is a judicial act. In this State all judicial power is vested in the courts (sec. 1, art. 6, const.) and legislative power is vested in the general assembly (sec. 1, art. 4, const.). So respondent claims only administrative powers. That claim is justified. * * * (State ex rel. Missouri Southern R. Co. vs. Public Service Commission of Missouri (No. 18332), Southwestern Reporter, vol. 168 S. W., pp. 1156, 1164.)

55 Our theory also seems to be supported by the language used in the organic law of this Board, Act No. 2307, as amended. Subsection (*a*) of section 16 of said Act, in vesting the Board with power to require public utilities to comply with the laws of the Philippine Islands and conform to the duties imposed upon them thereby, says:

Sec. 16. The Board shall have power, after hearing, upon notice, by order in writing, to require every public utility as herein defined:

(*a*) To comply with the laws of the Philippine Islands and with any provincial resolution or municipal ordinance relating thereto and to conform to the duties imposed upon it thereby or by the provisions of its own charter, whether obtained under any general or special law of the Philippine Islands.

* * * * * * *

The legal text above inserted seems to limit the power conferred upon this Board to seeing that public utilities comply with the laws and provincial resolutions and municipal ordinances relating to them, presupposing the validity or constitutionality thereof, and leaving all questions in this respect to the court of justice. It is evident that a power granted with such limitation can not be considered as a properly judicial, but as an administrative function, though its nature is quasi judicial.

There being a provision of law in force concerning the free carriage of the mails of the Philippine postal service, namely, that contained in section 309, above inserted, of Act No. 2657, and this Board having power to require the defendants, as public utilities, to duly

comply with said provision, by virtue of subsection (*a*), also transcribed, of section 16 of Act No. 2307, as amended, the Board should, and hereby does, direct all the said defendants, and each of them, to comply with the provisions of the aforesaid section 309 of Act No. 2657 and therefore not to refuse, on and after June 1, 1916, to carry free of charge the mail of the postal service of the Philippine Islands, as required by the said section, and, further, to instruct the masters and agents of their vessels plying between Philippine ports to continue to receive and carry the said mails on and after the
56 aforesaid June 1, as they have done heretofore.

Entered, Manila, June 1, 1916.

C. C. MITCHELL, *Secretary.*

I hereby certify that the foregoing is a true and correct copy of the original on file in this office.

C. C. MITCHELL, *Secretary.*

June 7, 1916.

SIR: I am inclosing herewith two copies of the decision of this Board in Case No. 781. Will you kindly have this translated into English and published in the Official Gazette and Gaceta Oficial. It is requested also that this office be furnished two copies of the English translation.

Very respectfully,

C. C. MITCHELL, *Secretary.*

To the Executive Secretary, Manila.

[Inclosures.]

June 19, 1916.

SIR: I am inclosing herewith copies of decisions of this Board in Cases Nos. 227 and 781. Will you kindly have these distributed in accordance with the addresses thereon.

Very respectfully.

C. C. MITCHELL, *Secretary.*

To the Chief, Bureau of Insular Affairs, War Department, Washington, D. C.
(Through the Executive Secretary.)

Inclosing copies for: The Chief, Bureau of Insular Affairs, Washington, D. C.; the Lawyers Coöperative Publishing Co., Rochester, N. Y.; Rate Research, 111 West Monroe Street, Chicago, Ill.; the Librarian, Law Library Cornell University, Boardman Hall, Ithaca, N. Y.; Mr. J. H. Goetz, editor, Law Publishing Company, 74 Broadway, New York City, N. Y.

57 I hereby certify that the foregoing, consisting of 56 [1] pages is a true and correct copy of the record of the Board of Public Utility Commissioners in its Case No. 781.

[Seal of the Board of Public Utility Commissioners.]

C. C. MITCHELL, *Secretary.*

Manila, June 29, 1916.

Thereafter, on July 3, 1916, Hon. Grant T. Trent, Associate Justice of the Supreme Court, acting in vacation, issued the following order:

THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

[G. R. No. 11899.]

YNCHAUSTI & COMPANY, COMPAÑÍA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT & COMPANY, and FERNANDEZ HERMANOS, Petitioners,

versus

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Respondent.

Order.

A certified copy of all the proceedings in case No. 781 before the Board of Public Utility Commissioners having been forwarded to this court, counsel for petitioners in case No. 11899 (Ynchausti & Company, Compañía General de Tabacos de Filipinas, J. M. Poizat & Company and Fernandez Hermanos versus The Board of Public Utility Commissioners) are hereby ordered to file their briefs in said case within thirty days, and forwarding a copy of same to the Attorney-General, who, in turn, shall have thirty days thereafter within which to file his reply brief, and, after the filing of the said briefs, let a date be fixed for the hearing of this case.

GRANT T. TRENT,
Associate Justice of the Supreme Court,
Acting in Vacation.

Manila, July 3, 1916.

On July 11, 1916, the petitioners filed their brief in the case.

On August 9, 1916, the respondent, by the Attorney-General, filed also its brief in the case. (Translation in Spanish of the brief was filed on August 19, 1916.)

58 The case came on for hearing in two consecutive sessions of the Court, to wit, on August 21 and 22, 1916. Mr. Charles C. Cohn appeared for the petitioners, and Mr. Chester J. Gerkin, as-

[1] Original typewritten pages.

sistant attorney of the Bureau of Justice, for the respondent. After hearing their arguments the court took the case under advisement.

Thereafter, on July 26, 1917, attorneys for both parties filed the following stipulation:

UNITED STATES OF AMERICA,
Philippine Islands:

(In the Supreme Court of the Philippine Islands.)

[G. R. No. 11899.]

YSCHAUSTI & COMPANY et al., Petitioners,

versus

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Respondent.

Whereas the above-entitled cause has been inadvertently omitted from the list of causes assigned for reargument and resubmission in this honorable court; and

Whereas the attorney for respondent is desirous of presenting additional authorities to this honorable court for consideration in the matter,

Now, therefore, it is stipulated by and between the respective parties hereto that, with consent and leave of this honorable court, the above-entitled cause be set for argument on the calendar of the same at 9 o'clock a. m. of the 3d day of August, 1917.

COHN & FISHER,
By CHARLES C. COHN,
Attorneys for Petitioners.
QUINTIN PAREDES,
Acting Attorney-General, Attorney for Respondent.

The Supreme Court, in its session of July 27, 1917, upon considering the foregoing stipulation filed by the attorneys for both parties in the case, ordered that the said case be included in the August calendar for reargument.

On August 21, 1917, the case was again argued by counsel for both parties and finally submitted to the Supreme Court for decision on the merits.

59 Thereafter, on August 8, 1917, the attorneys for the respective parties in the case filed a stipulation reading as follows:

UNITED STATES OF AMERICA,
Philippine Islands:

(In the Supreme Court of the Philippine Islands.)

[G. R. No. 11899.]

YNCHAUSTI & COMPANY et al., Petitioners,
versus
THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Respondent.

Whereas under and by virtue of the Acts of the Philippine Legislature, the above-named respondent has been wholly abolished and disbanded, and the duties and obligations of said respondent have been wholly conferred upon, and assumed by its successor, the Public Utility Commission:

Now, therefore, by and with the prior leave of this honorable court, it is hereby mutually stipulated and agreed that the aforesaid Public Utility Commission be, and the same is hereby substituted as respondent in the above-entitled proceeding, without further amendment or alteration of the issues in said proceeding.

Made at Manila, P. I., this 8th day of August, 1917.

COHN & FISHER,
By CHARLES C. COHN,
Attorneys for Petitioners.
QUINTIN PAREDES,
Attorney for Respondent.

Thereafter, on January 23, 1918, the Supreme Court rendered its decision in the case, which said decision is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
Philippine Islands:

(In the Supreme Court of the Philippine Islands.)

[G. R. No. 11899. Resubmitted August 21, 1917. Promulgated January 23, 1918.]

YNCHAUSTI & COMPANY, COMPAÑIA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT & COMPANY, and FERNANDEZ HERMANOS, Petitioners,
versus
THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Respondent.

60 *Decision.*

JOHNSON, *J.*:

The only question presented by these proceedings is, Whether the petitioners, who are operating vessels, engaged in the coastwise trade,

plying between Philippine ports, may be required to carry mail free of charge in accordance with the provisions of section 309 of the Administrative Code (Act No. 2657; section 568, Act No. 2711).

On the 1st day of June, 1916, the Board of Public Utility Commissioners ordered the said petitioners to receive and to carry mails free of charge. The question of the legality of said order was brought to this court for review.

We have made a careful examination of the facts and the law upon which said order was based and have reached the conclusion that the same and the law upon which it is based is in direct contravention of the provisions of the Organic Law of the Philippines, which prohibits the taking of private property for public use without just compensation.

For the reason, therefore, and without prejudice to the writing of an opinion in which the facts and the law shall be more fully discussed, that, by virtue of said order the private property of said petitioners is taken for public use without due compensation, contrary to the provisions of the Organic Law of the Philippines, it is hereby decreed and ordered that a judgment be entered nullifying and setting aside the same. And without any finding as to costs.

It is so ordered.

Arellano, C. J., Torres, Araullo, and Malcolm, JJ., concur.

Per CARSON, *J.*, dissenting:

1. Under the law in force in the Philippine Islands prior to the change of sovereignty from Spain to the United States in 1898, the right of merchant vessels to enter upon and engage in the coastwise carrying trade was conditioned upon their obligating themselves to carry the mails free of charge, under such reasonable regulations as might be prescribed by competent authority.

61

2. After the change of sovereignty in 1898, the practice of requiring these vessels to carry the mails free of charge was continued in force; and from time to time rules and regulations have been promulgated prescribing the conditions under which the mail should be received, transported and delivered.

3. The owner of every merchant vessel now engaged in the coastwise trade in Philippine waters voluntarily obligated himself to carry the mails free as a condition of his entry upon the business of a common carrier in these waters; and that which one voluntarily surrenders cannot be reclaimed on the ground that it has been taken for public use without just compensation or without due process of law. In such cases there is no "taking" or "deprivation" of property in the sense in which those terms are used in the Constitution. The "taking" there contemplated is a taking against the will and wish of the owner.

4. No one is obliged or compelled to invest his money in coastwise trading vessels, or to enter the coastwise trade in Philippine waters; and no one is obliged or compelled to carry the mails free until and unless he voluntarily assumes that obligation, by voluntarily entering the coastwise trade.

5. None of those now engaged in the coastwise trade in the Philippine Islands (some of whom are natives of the Islands, others American citizens, and still others foreigners) had an absolute or unqualified right to enter upon and engage in that business or occupation; and no one who desires, now or hereafter, to enter upon that business can assert any vested or private property right, or an absolute or unqualified right of any kind, in or to the carrying trade between the various ports in the Philippine Islands.

6. Common carriers exercise a sort of public office, and have duties to perform in which the public has an interest. For that reason alone, all foreigners may be excluded from this quasi public business, in the absence of treaty stipulations; and no one has a right to enter upon this business except upon such reasonable terms and conditions as may be prescribed therefor by the state.

7. No one who is unwilling to accept, or who declines to accept, the prescribed terms and conditions can successfully maintain that the imposition of such terms and conditions upon the original grant of a license to enter and engage in the coastwise trade, deprives him of private property without just compensation or due process of law. If he is not willing to seek a license and to enter the carrying trade in Philippine waters under the conditions prescribed by the Legislature, he is at perfect liberty to decline to do so. But in that event nothing has been taken from him to which he could assert any claim of property. On the other hand, if he voluntarily accepts the condition, there is no "taking" of property as that term is used in the Constitution.

62

8. The situation of an original applicant for such a license is wholly different from that of one upon whom a legislative demand is made for the performance of some service free of charge, or for an inadequate compensation after he has invested his money and dedicated his property to a use in which the public has an interest.

9. The requirement as to the free carriage of the mails is not prescribed in the Philippine Islands as a measure of regulation imposed upon a public utility under the police power of the state.

10. The assumption of the obligation is, and always has been, required in the Philippine Islands as a condition precedent to the original grant of a license to owners of vessels seeking the privilege of entry upon the quasi public business of common carriers in Philippine waters, together with the right in the conduct of such business, to make use of the ports, harbors, docks, wharves, and other facilities furnished at public expense, which have been constructed, primarily and more especially, for the convenience and safety of those engaged therein.

11. It lies, therefore, within the uncontrolled discretion of the Legislature whether the condition thus exacted should be made more or less burdensome; and the courts are not clothed with authority to review the exercise of this discretion, unless, perhaps, it is alleged that the condition is not required of all alike, or that it tends to create a monopoly. The condition thus exacted for the issuance of an original license is the price, or a part of the price, paid for the privilege conferred upon the licensee.

12. The parcel-post system of the United States has not been inaugurated in the Philippine Islands. The statutory requirement for the free carriage of the mails merely prescribes that coastwise vessels shall "continue" to carry the mails free —that is to say, that the vessels shall carry the mails under like terms and conditions as *it* was carried prior to the enactment of the statute in 1916.

13. The burden of the free carriage of the mails, voluntarily assumed by the shipowners heretofore, has not been shown to be either oppressive or confiscatory; and the mere possibility that unjust, unreasonable, or oppressive regulations may be adopted hereafter affords no ground for a declaration that the statute as enacted is invalid or unconstitutional.

14. The statutory requirement for the free carriage of the mails does not violate the provisions of the Act of Congress prescribing a uniform rule of taxation.

15. The obligation of service involved in the free carriage of the mails is not now and never has been required of any person until and unless it is voluntarily assumed by one who voluntarily enters the carrying trade in Philippine waters; and the right of the state to deny original entry upon that trade to all who do not assume that obligation may be sustained on the theory that the state may make such conditions precedent as
63 it deems proper and expedient for the enjoyment of the privilege of entering upon and engaging in this quasi public business, with the right to make use of the docks, wharves, ports, harbors, and other shipping facilities furnished at public ex-

pense, primarily and more especially, for the safety and convenience of those engaged in that business.

16. Special charges, known as dock, wharf, port, harbor, canal and pilotage fees, tonnage dues, and the like are paid without protest by merchant vessels making use of the docks, harbors, and canals of all maritime nations. Each state determines, in its discretion, the amount and character of such charges; and it seems clear that the Government of the Philippine Islands may properly limit the privilege of the use of its docks, wharves, ports, and harbors in the conduct of the business of common carriers, to such vessels as agree to carry the mails free, by way of compensation, in whole or in part, for the use of these shipping facilities, furnished at public expense to those engaged in this quasi public business.

CARSON, *J.*, dissenting:

The object of these proceedings is to secure a judicial declaration of the invalidity of an Act of the Philippine Legislature, on the ground that it is repugnant to certain provisions of the Constitution of the United States and its amendments, incorporated in the Act of Congress of July 1, 1902, and the Act of Congress of August 29, 1916.

The petitioners allege that if the statute be maintained in force, the value of the private property which will be taken from themselves and others engaged in the coastwise carrying trade in Philippine waters, for public use and without just compensation, will amount to not less than ₱90,000 annually; and, though this is undoubtedly a high estimate, it is certain that a favorable ruling on their contentions will place an annual burden of many thousands of pesos on the Government and the people of the Philippine Islands.

Differing from my brethren as to the disposition which should be made of the grave questions submitted in the course of these proceedings, I am constrained to set out, at length, the grounds upon which I rest my conclusions.

I shall waste no time in discussing mere matters of form or procedure, nor shall I burden the body of this opinion with argument or citation of authority upon questions as to which no issue has
64 been raised, or with regard to which there is no real contention between the litigants or within the body of the court itself.

The power of this court to declare an Act of the Philippine Legislature invalid if it is found to be in conflict with the Acts of Congress of July 1, 1902, and August 29, 1916, is not questioned. It is not contended that the provision of the Constitution of the United States incorporated into these Acts of Congress are to be given any other or different meaning in this jurisdiction than that which should be given like provisions as found in the Constitution itself. No one doubts that the right to make and recover reasonable charges for the transportation of persons, goods, merchandise, or cargo of any kind aboard a merchant vessel engaged in the coastwise trade is a right of property. It is admitted that an appreciable burden is imposed upon

the various vessels engaged in the coastwise trade in the Philippine Islands as a direct result of the enforcement of a law requiring such vessels to carry the mail free of charge. It is well settled that private property cannot be taken for public use under the guise of regulation of the business of common carriers in the exercise of the police powers of the state. These and a number of correlated questions discussed at length in the briefs of counsel are so well settled in this jurisdiction, or so freely admitted by opposing counsel, that their discussion at this time can serve no useful purpose, and would tend merely to becloud the real issues.

What, then, are the real questions raised by the pleadings and submitted for adjudication?

Under the law in force in the Philippine Islands prior to the change of sovereignty from Spain to the United States in 1898, the right of merchant vessels to enter upon and to engage in the coastwise carrying trade was conditioned upon their obligating themselves to carry the mails free of charge, under such reasonable regulations as might be prescribed by competent authority. This requirement as to the free transportation of the mails by merchant vessels in the coastwise trade is said to have been in force from time immemorial; and certain it is that the existence of a custom or a
65 practice of this kind, with the force of law, can be traced in the Spanish decree through a period of more than half a century. (Cf. marginal note "A".)

After the change of sovereignty in 1898, the practice of requiring these vessels to carry the mails free of charge was continued in force; and from time to time rules and regulations have been promulgated prescribing the conditions under which the mail should be received, transported, and delivered.

No objection appears to have been made to the practice, or, at least, none appears of record, until some time in the year 1912, when the present petitioners protested the validity of all laws, rules, and regulations requiring them to carry the mails free of charge, on the ground that they are repugnant to the Act of Congress of July 1, 1902, expressly extending to these Islands the constitutional prohibitions against the taking of private property for public use without just compensation. But from that date until this case was finally su*mb*itted, these petitioners have unceasingly pressed their claim for relief through administrative, legislative, and judicial channels.

Apparently as a direct result of this agitation, the Philippine Legislature enacted a provision in the Administrative Code of 1916 (sec. 309) which continues in force the provisions of the former law in regard to the free carriage of the mails in the following language: "Vessels engaged in the coastwise trade and vessels plying between Philippine ports shall continue to carry mail free."

It is this provision, imposing no new obligations and merely continuing in force an immemorial practice, which is challenged on the ground that it is repugnant to the constitutional limitations upon the powers of the Government of the Philippine Islands.

The principal contentions of counsel for the petitioners are that the statute provides for the taking of private property for public use

without just compensation, and that it deprives the owners of vessels engaged in the coastwise trade of their property without due process of law.

But the owner of every merchant vessels now engaged in the coastwise trade in Philippine waters voluntarily obligated himself to carry the mails free as a condition of his entry upon the busi-
66 ness of a common carrier in these waters; and that which one voluntarily surrenders cannot be reclaimed on the ground that it has been taken for public use without just compensation or without due process of law. In such cases there is no "taking" or "deprivation" of property in the sense in which those terms are used in the Constitution. The "taking" there contemplated is a taking against the will and wish of the owner.

Every shipowner, native or foreign, who has constructed, or imported, or purchased a vessel for service in the Philippine coastwise trade did so with the full knowledge that under the law, as enforced in these Islands, such vessels could not be licensed and entered in that service except on condition that it would carry the mails free. No one is obliged or compelled to invest his money in coastwise trading vessels, or to enter the coastwise trade in Philippine waters; and no one is obliged or compelled to carry the mails free until and unless he voluntarily assumes that obligation, by voluntarily entering the coastwise trade.

It may be contended that the imposition of such a condition was unlawful, and that no such condition can lawfully be imposed hereafter upon applicants for original licenses to enter the business of common carriers in Philippine waters; but such contentions, if they can be sustained at all, must be sustained on some other ground than that the imposition of the condition constituted, or constitutes a taking of private property for public use without just compensation or without due process of law.

None of those now engaged in the coastwise trade in the Philippine Islands (some of whom are natives of the Islands, others American citizens, and still others foreigners) had an absolute or unqualified right to enter upon and engage in that business or occupation; and no one who desires, now or hereafter, to enter upon that business can assert any vested or private property right, or an absolute or unqualified right of any kind, in or to the carrying trade between the various ports in the Philippine Islands.

Common carriers exercise a sort of public office, and have duties to perform in which the public has an interest. For that reason alone, all foreigners may be excluded from this quasi public
67 business, in the absence of treaty stipulations; and no one has a right to enter upon this business except upon such reasonable terms and conditions as may be prescribed therefor by the state. Furthermore, it is a matter of general knowledge that the construction and maintenance of docks, wharves, ports, harbors, and other facilities, especially adopted for the use of vessels engaged in the coastwise trade, has necessitated heavy expenditures from the public funds in the past; and that appropriations, aggregating many thousands of pesos, are made for that purpose every year. And while it

is true that the right to make use of these shipping facilities is not confined strictly to this class of vessels, and that the benefits derived from their construction and maintenance redounds indirectly to the general welfare of all the people of the Islands; it is equally true that a large part of these expenditures is made primarily, if not exclusively, for the benefit of vessels engaged in the coastwise trade, and a special burden is imposed upon the general public by the peculiar necessities of this class of shipping, which could not thrive without the special benefits thus conferred at the expense of the public.

Not only the nature of their business as common carriers, but also the special benefits thus conferred at the expense of the general public, and the special burden thus imposed upon the general public, empower the state to require a license of all persons entering upon the coastwise carrying trade; and to fix such terms and conditions for the issuance of such licenses as it deems proper, provided these terms and conditions do not infringe upon any of the constitutional limitations upon the powers conferred upon the state.

No one who is unwilling to accept, or who declines to accept, the prescribed terms and conditions, can successfully maintain that the imposition of such terms and conditions upon the original grant of a license to enter and engage in the coastwise trade, deprives him of private property without just compensation or due process of law. If he is not willing to seek a license and to enter the carrying trade in Philippine waters under the conditions prescribed by the legislature, he is at perfect liberty to decline to do so. But in that event nothing has been taken from him to which he could assert
68 any claim of property. On the other hand, if he voluntarily accepts the condition, there is no "taking" of property as that terms is used in the Constitution.

Petitioners attack the validity of the condition requiring them to carry the mails free on other grounds which I shall consider hereafter; but at this time I am more particularly devoting myself to their claim that the imposition of such a condition on the original grant of a license to enter upon and engage in the coastwise carrying trade had or has the effect of taking their private property without just compensation or due process of law.

The situation of an original applicant for such a license is wholly different from that of one upon whom a legislative demand is made for the performance of some service free of charge, or for an inadequate compensation after he has invested his money and dedicated his property to a use in which the public has an interest.

A statutory requirement that a railroad, already in operation at the time of its enactment, must carry mails free, might and doubtless would leave the owner of the railroad no real election as to compliance with its terms. If the statutory requirement is enforced, he must carry the mails free, or quit his business and abandon his railroad and his investment at a ruinous sacrifice. In neither case does he act voluntarily or in compliance with an obligation voluntarily assumed.

On the other hand, if he had obligated himself under his franchise or charter to carry the mails free of charge as a condition upon

which the franchise should be granted, or if at the time of the acceptance of his franchise he was aware that under the general laws of the state the free carriage of the mails was required or might be required of all railroads operating in the state, he would not be heard to protest against the enforcement of the requirement for the free carriage of the mails on his railroad on the ground that it had the effect of depriving him of his property without just compensation or due process of law.

The Manila Railroad Company was constructed prior to the American occupation under a charter granted by the Spanish sovereign. If the railroad company had obligated itself, under
69 its charter, to carry the mails free, or to carry police officers and other Government officials without charge, or if it had accepted its charter under a general law imposing or authorizing the imposition of such duties upon all railroads operating under charter in the Philippine Islands, would it be seriously contended that as a result of the change of sovereignty and the extension of the Philippine Islands of the constitutional prohibition against the taking of private property for public use without just compensation or due process of law, the railroad company would have the right to repudiate those charter obligations, voluntarily assumed at the time when it accepted its charter, and to continue thereafter to conduct its business as a common carrier under the charter.

The Manila Electric Railroad Company, constructed since American occupation, obligated itself under its charter to carry uniformed police officers free of charge, but it does not appear to have occurred to its shareholders to attempt to repudiate that charter obligation, voluntarily assumed, on the ground that it has the effect of taking its private property without just compensation.

I am unable to apprehend the distinction between these cases and the case of a vessel, seeking its original license to enter the coastwise carrying trade, and to make use of the ports, harbors, docks, and wharves of the Philippine Islands in the conduct of its business as a common carrier, which accepts such a license with the obligation annexed thereto that it must carry the mails free so long as it continues in that business.

The imposing array of authorities cited in the briefs of counsel wherein the courts have held invalid various attempts to impose obligations of service, without just or adequate compensation, on owners of railroads already constructed and in operation, appear to me, therefore, to be wholly irrelevant and beside the real issues involved in the instant case.

Much was made in the argument of counsel of the comment of the court in the case of Chicago & N. W. Ry. vs. Dey (35 Fed., 881), in part as follows:

70 It is said that the complainant is a foreign corporation, permitted simply as an act of grace to do business in this state, and that the legislature may therefore impose such terms and conditions upon its doing business in the state as it sees fit; that the carrier is not bound to continue in business, and if he finds the rates imposed by the state not remunerative, may abandon the business. Whatever

of force there may be in such arguments, as applied to mere personal property capable of removal and use elsewhere, or in other business, it is wholly without force as against railroad corporations, so large a proportion of whose investment is in the soil and fixtures appertaining thereto, which cannot be removed, for a government, whether that Government be a single sovereign or one of the majority, to say to an individual who has invested his means in so laudable an enterprise as the construction of a railroad, one which tends so much to the wealth and prosperity of the community, that, if he finds that the rates imposed will cause him to do business at a loss he may quit business, and abandon that road, is the very irony of despotism. Apples of Sodom were fruit of joy in comparison.

But an examination of the facts in this, as well as the whole series of cases cited by counsel which turn on like principles, discloses that the rulings relied upon were directed against an attempt to impose obligations of service without just or adequate compensation, by way of regulation, and in the exercise of the police power, after the carrier had entered the business in which he was engaged, and invested his money in property which he could not abandon without ruinous sacrifices. Manifestly, the argument just cited would have no force as to a railroad corporation seeking permission to enter the business of a common carrier before it had built its roadbed or invested its money in the proposed enterprise.

I think that the distinction I am seeking to emphasize is quite clearly recognized in two recent decisions of the Supreme Court of the United States.

In the case of the Interstate Consolidated Street Railway Company vs. Commonwealth of Massachusetts decided November 4, 1907 (207 U. S., 79), the court held as follows, in the language of the syllabus:

A street railway whose charter subjects it to "all the duties, liabilities, and restrictions set forth in all general laws now or
71 hereafter in force relating to street railway companies," is bound by the requirement of the statute previously enacted, that street railway companies shall transport school children at a reduced rate, although such statute may be unconstitutional as to already existing corporations.

In the body of the opinion the court says (italics mine):

A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter, and confines itself to that ground. The section of the Revised Laws (chap. 112, sec. 72) was a continuation of Stat., 1900, chap. 197. (Rev. Laws, chap. 226, sec. 2. Com. vs. Anselvich, 186 Mass., 376, 379, 380, 104 Am. St. Rep., 590, 71 N. E. 790.) The act of incorporation went into effect March 15, 1901. (Stat. 1901, chap. 159.) By the latter act the plaintiff in error was "subject to all the duties, liabilities, and restrictions set forth in all general laws now or hereafter in force relating to street railway companies, except," etc. (Sec. 1; see also sec. 2.) *There is no doubt that, by the law as understood, in Massachusetts, at least, the provisions of Rev. Laws, chap. 112, sec. 72 (Stat., 1900, chap.*

197), if they had been inserted in the charter in terms, would have bound the corporation, whether such requirements could be made constitutionally of an already existing corporation or not. The railroad company would have come into being and have consented to come into being subject to the liability, and could not be heard to complain. (Rockport Water Co. vs. Rockport, 161 Mass., 279, 37 N. E., 168; Ashley vs. Ryan, 153 U. S., 436, 443, 38 L. ed., 773, 777, 4 Inters. Com. Rep., 664, 14 Sup. Ct. Rep., 865; Wight vs. Davidson, 181 U. S., 371, 347, 45 L. ed., 900, 903, 21 Sup. Ct. Rep., 616; Newburyport Water Co. vs. Newburyport, 193 U. S., 561, 579, 48 L. ed., 795, 800, 24 Sup. Ct. Rep., 553.)

In the case of Sutton vs. State of New Jersey decided May 21, 1917, (U. S. Adv. Ops., p. 508), the Supreme Court of the United States held, in the language of the syllabus, as follows:

The requirement of N. J. Laws, 1912 (p. 235), that street railway companies grant free transportation to city detectives not in uniform when in the discharge of their public duties, cannot be said to contravene United States Constitution, fourteenth amendment, as being an arbitrary or unreasonable exercise of the police power,
72 especially where the charter of the street railway company in question was under N. J. Const., art. 4, sec. 7, p. 11, and N. J. Laws 1846, p. 17, subject to alteration, in the discretion of the legislature.

It was shown that at the time of the incorporation of the railroad company, and for many years prior thereto, it had been the custom of street railway companies in New Jersey to carry police officers free, and this fact is stressed in the body of the opinion, together with the fact that the charter of the company was subject to alteration in the discretion of the legislature to rebut the contention that the statutory requirement contravened the prohibitions in the Constitution of the United States and its Amendments against the taking of private property without just compensation or due process of law.

When this case was decided by the Supreme Court of New Jersey, October 21, 1912 (89 Atl., 1057), that court said, again making use of the syllabus, that:

The act of March 26, 1912 (P. L., p. 235), requiring street railways to grant free transportation to police officers, does not take, without compensation, the property of a street railroad company which was incorporated at a time when it was customary for such railroads to carry members of the police force without compensation, since it does not lose anything by such custom being given the force of statutory law.

In the body of that decision I find the following:

The constitutionality of legislation is not always to be tested by abstract reasoning. It depends, in part at least, upon the habits and customs of the community. The mill acts, authorizing dams by which the land of other owner are flowed (Head vs. Amoskeag Mfg. Co., 113 U. S., 9, 5 Sup. Ct., 441, 28 L. ed., 889); the acts providing for drainage of swamp lands at the expense, in part, of unwilling owners (Wurts vs. Hoagland, 114 U. S., 607, 5 Sup. Ct., 1086, 29

L. ed., 229); the taking of land for levee in Louisiana (Eldredge vs. Trezevant, 160 U. S., 452, 16 Sup. Ct., 345, 40 L. ed., 490); the irrigation of arid lands (Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, 17 Sup. Ct., 56, 41 L. ed., 369; Clarke vs. Nash, 198 U. S., 361, 25 Sup. Ct., 676, 49 L. ed., 1085, 4 Ann. Cas., 1171); the construction of an aërial bucket line across another man's land (Strickley vs. Highland Bay Mining Co., 200 U. S., 527, 26
73 Sup. Ct., 301, 50 L. ed., 581, 4 Ann. Cas., 1174) are all instances of the extent to which the right of property may be modified by local customs or local needs, and justify the language of the United States Supreme Court in Otis Co. vs. Ludlow Co., 201 U. S., 140, at page 154, 25 Sup. Ct., 353, at page 355 (50 L. ed., 606), that "even the incidents of ownership may be cut down by the peculiar laws and usages of a state." *It is shown in this case that at the time of the incorporation of the defendant company, and for many years prior thereto, and subsequently until the public utilities act of 1910 (P. L., p. 56) was supposed to make the practice illegal, it had been the custom of the street railway companies to carry members of the police force free. The defendant company acquired its rights while that custom was in vogue, and, if the custom is now given the force of statutory law, the company loses nothing which it had either in possession or immediate anticipation at the time of its incorporation.* In that respect, the case resembles Interstate Consolidated Street Railway Co. vs. Massachusetts, in which, however, the requirement of a half fare rested upon an antecedent statute. The underlying principle, however, is the same. (Italics mine.)

Counsel make much of the fact that no cases have been cited wherein common carriers in the United States have been required by statute to carry the mails free. But the conditions under which common carriers are engaged in the coastwise trade in the United States and in the Philippine Islands are clearly differentiated by the fact that in the United States great sums of money have been invested in shipping adopted to coastwise trade, under a governmental policy which did not exact an obligation to carry the mails free as a condition of the original entry of their owners upon that business; whereas, every shipowner who has entered the coastwise trade in the Philippines has done so with full knowledge of the local governmental policy and of the provisions of the Spanish laws continued in force under the American occupation, whereby their original entry upon the coastwise carrying trade was conditioned upon their assumption of the obligation of carrying the mails free so long as they continued in that business.

It is not for the courts of either country to pass judgment upon the wisdom or unwisdom of the policy adopted by their
74 respective legislative authorities in opening their ports to vessels engaged in the coastwise trade.

I come now to consider the other ground upon which the petitioners rest their contentions as to the invalidity of the statute.

It is urged that the requirement that coastwise trading vessels carry the mails free denies the owners of these vessels the equal protection of the laws.

But how can this contention be sustained in the face of the indisputable fact that the requirement is and always has been universal in its application? Its effect is to prohibit every person whatever from entering the coastwise trade who is unwilling to carry the mails free. It bears with equal force upon all, whether resident or nonresident, native or foreigner. It denies no right to any person which it recognizes in favor of another. All, alike, are at perfect liberty, under the law, to decline to render this service, by declining to enter the coastwise trade. All, alike, are equally bound, under the law, to render this service, unless they refrain from entering the coastwise trade and exercising the rights and privileges conferred upon coastwise traders.

There was some intimation in the oral argument of counsel that the law may have the effect of denying the equal protection of the laws to some coastwise traders by compelling them to carry the mails free, while others, more especially favored, receive payment for that service.

But the mere fact that through some mistake, oversight, or official favoritism, some vessel owner may receive payment for services which he is bound to render without direct compensation, while it might justify criticism of the payment thus made to a particular vessel owner, would not sustain a finding that the law itself, which makes no such exception in favor of any one, falls within the prohibited class of legislation. Moreover, there is nothing in the record which justifies the intimation that unjust discriminations of this kind have been made in the past, are made in the present, or are likely to be made in the future.

Recourse to official records discloses that for a few years so-called mail subventions were paid to owners of certain vessels on
75 a few of the more important postal routes; but an examination of the terms and conditions on which these subventions were granted will make it clear that in those cases payment was not made for the carriage of the mails, but rather for the maintenance on these routes of vessels of specified speed, dimensions, and standard of accommodations, which were run, under heavy penalties, upon fixed schedule, and with special provisions under which the mail should be accepted, transported, and delivered.

It appears, however, that no such subventions have been paid in recent years, except only in the case of the ferry between Manila and Cavite, with which special arrangements seem to have been made for the maintenance of frequent daily delivery of the mails for the convenience of the Army and Navy; and the record discloses that payment for this special service is made from Federal and not Philippine appropriations.

It is further contended that this requirement of the free carriage of the mails should be declared invalid on the ground that it is an unreasonable exercise of the power of the state—unjust, oppressive, and confiscatory.

It should be sufficient answer to all such contentions to say that, as I have already indicated, the burden was voluntarily assumed by each of the petitioners, with full knowledge of the nature and extent

of the obligation assumed by him, before he entered the coastwise trade; so that none of them can now be heard to complain in a court of law that the burden thus assumed is oppressive or unreasonable.

It must be kept clearly in mind, furthermore, that the requirement as to the free carriage of the mails is not prescribed in the Philippine Islands as a measure of regulation imposed upon a public utility under the police power of the state. It is well settled that private property may not be taken for public use without just compensation under the guise of police regulations; and it is admitted that such regulations are subject to review and annulment by the courts, if found to be unreasonable, oppressive, and confiscatory.

The numerous citations of authority in support of these propositions to which our attention has been directed are, therefore,
76 wholly beside the real issues involved in these proceedings.

The assumption of the obligation is, and always has been, required in the Philippine Islands as a condition precedent to the original grant of a license to owners of vessels seeking the privilege of entry upon the quasi public business of common carriers in Philippine waters, together with the right in the conduct of such business, to make use of the ports, harbors, docks, wharves, and other facilities furnished at public expense, which have been constructed primarily and more especially for the convenience and safety of those engaged therein. It lies, therefore, within the uncontrolled discretion of the Legislature whether the condition thus exacted should be made more or less burdensome; and the courts are not clothed with authority to review the exercise of this discretion, unless, perhaps, it is alleged that the condition is not required of all alike, or that it tends to create a monopoly. The condition thus exacted for the issuance of an original license is the price, or a part of the price, paid for the privilege conferred upon the licensee. It is not for the courts, but for the Legislature to determine what price should be demanded, on behalf of the public, for such a privilege, having in mind the needs of the public treasury; the amount of the expenditures of public funds on account of the facilities furnished, primarily and more especially, to those engaged in the carrying trade in Philippine waters; and other questions of public policy having to do with the necessity or lack of necessity for the offer of special inducements to capitalists to invest their money in the business, and the like.

Aside from all this, I am satisfied that an examination of the record discloses that the petitioners have failed utterly to establish their contentions in this regard; and, indeed, I am convinced that with the aid of the public records, and having in mind matters of common knowledge of which the courts may take judicial notice, we would be justified in holding affirmatively that the requirement is neither unreasonable, nor unjust, nor oppressive, nor con-
77 fiscatory in any other sense than that in which the recovery of license fees, tolls, tonnage due, occupation taxes, and the like can be said to be confiscatory.

Among the petitioners are included several of the largest and oldest fleets of vessels engaged in the interisland trade. Some of the

officers of these shipping corporations, long in their service, were called as witnesses before the Board of Public Utility Commissioners, in support of petitioners' contentions as to the alleged oppressive and confiscatory effect of the requirement of the free carriage of the mails by their vessels. None of these officers was able to recall a single instance in the history of the coastwise trade in which any of their vessels was compelled to reject general cargo because of lack of space occasioned by the free carriage of mail. Asked by their counsel if the amount of mail carried by any of their vessels ever exceeded 100 bags, the witnesses were able to remember but a few instances of that kind, and emphasis being laid upon one occasion when approximately 200 bags were carried from Manila to Iloilo on one of the large steamers plying between those ports; though it developed on cross-examination that, on that occasion, the vessel was operated under one of the so-called subvention contracts in existence some years ago, under which a few of the larger and speedier vessels received an allowance from the Government, conditioned upon the maintenance of a regular sailing schedule and specified standards of public service, required only of vessels sailing under a Government subsidy.

Much was made of the fact that the carriage of the mails necessarily involves the expenditures of time and labor in stowing and handling it aboard the vessels on which it is transported; and the record discloses that on occasions, small sums have been paid to messengers to carry the mail from ship side to the post office in some of the smaller towns. It does not appear, however, that the burden of handling and stowing the mails aboard any of these vessels has necessitated an increase of the crews, or subjected the shipowner to any substantial loss or expense; and it affirmatively appears that acceptance and delivery of the mails at the wharves or local landing places at all ports of call is all that has ever been required of
78 them under the statutory requirement for the free carriage of the mails.

No other evidence was introduced by the petitioners in support of their contentions that the requirement of the free carriage of the mails is unreasonable, oppresive, and confiscatory, save only certain vague and indefinite statements as to the alleged inconvenience and trouble to which they are put by compliance with shipping regulations, requiring all shipmasters to give reasonable notice of their sailing hours to the post offices at the various ports at which they touch, and imposing other obligations of a like nature on vessels engaged in the coastwise carrying trade. But these regulations impose no special or prescribed schedule on vessels engaged in the coastwise trade; and the statutory requirement for the free carriage of the mails does not impose upon these vessels any obligation to comply with unreasonable, oppressive, or confiscatory regulations—if any there be—it matters not by what authority they may be promulgated.

It is not denied that an appreciable burden is assumed by all coastwise trading vessels when they obligate themselves to carry the mails free; but there is nothing in the record which would justify

a finding that the requirement of the free carriage of the mails imposed as a condition precedent to the grant of a license to engage in the coastwise carrying trade is unreasonable, oppressive, or confiscatory.

The burden of the free carriage of the mails, distributed as it is among the numerous vessels engaged in the coastwise trade, so that seldom does any such vessel, except the largest, take aboard more than a few sacks of mail (rarely as much as 100 sacks on the largest vessels), and so that no such vessel has ever found it necessary to reject cargo for lack of the space occupied by the mails, would not seem to me unreasonable, oppressive, or confiscatory, even if no large expenditures of public funds were made to enhance the value of the privileges enjoyed by these vessels when licensed to engage in the coastwise carrying trade.

But having in mind the large sums of money expended from the public treasury in the construction and maintenance of docks, wharves, ports, harbors, and other shipping facilities in-
79 tended, primarily and more especially, for the use and convenience of those licensed to engage in the coastwise carrying trade, the contentions of petitioners in this regard do not seem to be worthy of any serious consideration.

In this connection, it may be worth while to repeat here a part of what I said in the case of De Villata vs. Stanley (G. R. No. 8154, 14 O. G., pp. 172, 173), wherein we rejected similar contentions as to the alleged unreasonableness of certain regulations imposed upon vessels carrying the mails in Philippine waters:

Considerable expenditures of public money have been made in the past and continue to be made annually for the purpose of securing the safety of vessels plying in Philippine waters. To this end lighthouses have been erected; wharves and docks constructed; buoys, bells, and other warning signals maintained at points of danger. Largely for the purpose of conveying timely warnings of threatening weather to those that go down into the sea in ships, appropriations are made for the support of a Weather Bureau. Coast and geodetic surveys are conducted to keep them informed as to the dangers hidden beneath the treacherous sea. Licensed pilots are provided to insure safe entry into the dangerous ports and harbors throughout the Islands. Maps, charts, and general information as to conditions affecting travel by water are kept up to date, and furnished all vessels having need of them. In a word, the Government unhesitatingly spends a considerable part of the public funds wherever and whenever it appears that the safety and even the convenience of the shipping in Philippine waters will be advanced thereby. Can it be fairly contended that a regulation is unreasonable which requires vessels licensed to engage in the interisland trade, in whose behalf the public funds are so lavishly expended, to hold themselves in readiness to carry the public mails when duly tendered for transportation, and to give such reasonable notice of their sailing hours as will insure the prompt dispatch of all mails ready for delivery at the hours thus designated?

A loud outcry was made in oral argument as to the possible wrongs

which the petitioners would suffer if the Government were to extend to the Philippine Islands the parcels-post system recently inaugurated in the United States. The length, the breadth, the thickness, the weight and the various contents of the packages of goods
80 and merchandise which may be sent by parcels-post in the United States are cited in proof of the unreasonable and oppressive and confiscatory character of the requirement of the free carriage of the mails in Philippine waters.

I do not pretend to know what would be the effect of the inauguration of such a system in these Islands. There is nothing in the record on which to base a finding of facts in this regard. But it seems to me that all this outcry is completely disposed of by two considerations. (1) The parcel-post system of the United States has not been inaugurated in the Philippine Islands. (2) The statutory requirement for the free carriage of the mails merely prescribes that coastwise vessels shall "continue" to carry the mails free—that is to say, that the vessels shall carry the mails under like terms and conditions as *it* was carried prior to the enactment of the statute in 1916.

If changes made hereafter in the postal regulations should have the effect of admitting matter to the mails in such quantities, or of such kinds, that it could be shown that these regulations impose an unreasonable, oppressive, or confiscatory burden upon the shipowners, not voluntarily assumed by them, it well might be that it would become the duty of the courts to declare all such regulations invalid. But even in that event, the courts would not be justified in holding the statute or the postal regulations invalid or unconstitutional, except only in so far as they may be found to have the effect just indicated.

Under an elementary rule of construction the courts should decline, when possible, to construe a statute so as to make it conflict with the Constitution, and should rather put such interpretation upon it as will avoid such a conflict; and it is well settled that the courts should limit a judicial declaration of the unconstitutionality of a statute to so much thereof as is found to be repugnant to the constitutional limitations upon the powers of the legislature, and sustain the validity of the statute so far as it is not necessarily in conflict with these constitutional provisions.

If then, it could be made to appear that changes made hereafter have the effect of imposing an unreasonable or confiscatory
81 burden on the shipowners, not voluntarily assumed by them, it might be the duty of the court to hold the statutory requirement for the free carriage of the mails invalid in so far as it appears to authorize the imposition of such an unreasonable and oppressive burden. But the court should not go farther, and attempt to invalidate the requirement for the free carriage of the mails as that requirement has been understood and applied for more than a half a century.

It will be remembered that the statute, enacted in 1916, merely requires the free carriage of the mails in like manner as they had been carried heretofore. We have seen that the burden of the free carriage of the mails, voluntarily assumed by the shipowners heretofore, has

not been shown to be either oppressive or confiscatory; and the mere possibility that unjust, unreasonable, or oppressive regulations may be adopted hereafter affords no ground for a declaration that the statute as enacted is invalid or unconstitutional.

It is true that after the American occupation, the Federal Postal Regulations were extended to the Philippine Islands, and that under these regulations, as under the former Spanish regulations, small packages of merchandise, strictly limited to size and weight, might be sent through the mails. But these regulations were in force in these Islands prior to the enactment of the Acts of Congress relied upon by the petitioners (marginal note A); and their voluntarily assumed obligation to carry the mails free clearly contemplated the carriage of this class of mail matter, which as we have seen, never has imposed and does not now impose any oppressive or confiscatory burden upon the vessels engaged in the coastwise trade. The record discloses that the weight limit on this class of mail matter under Philippine Postal Regulations is 5 kilos, or about 12 pounds. In the absence of clear and positive evidence to the contrary, this court cannot properly declare judicially, that reasonable and moderate changes, such as have in fact been made in the local postal regulations, are either oppressive or confiscatory, and of course the
82 courts should not and cannot presume that other changes in these regulations which may be made in the future will have that effect.

The possibility of abuse, arising from the adoption of the parcels-post system, or other changes in the local mail regulations, have, therefore, no real bearing on the instant case. This court has no authority to pronounce anticipatory judgments as to the effect of future legislation, imposing new or additional obligations upon common carriers and others licensed to do business in the Philippine Islands.

As was said by the Supreme Court of the United States in the case of Tanner vs. Little (240 U. S., 369):

Nor is there support of the system or obstruction to the statute in declamation against sumptuary laws, nor in the assertion that there is evil lesson in the statute, nor in the prophecies which are ventured of more serious intermeddling with the conduct of business. Neither the declamation, the assertion, nor the prophecies can influence a present judgment. As to what extent legislation should interfere in affairs political philosophers have disputed and always will dispute. It is not in our province to engage on either side, nor to pronounce anticipatory judgments. We must wait for the instance.

And again in the case of Atkins vs. Kansas (191 U. S., 207, 223):

So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's

representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional right of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly palpably, beyond all question, in violation of the fundamental law of the Constitution.

83 It is further contended that the statutory requirement for the free carriage of the mails violates the provisions of the Act of Congress prescribing a uniform rule of taxation.

Assuming that the requirement is in the nature of an occupation tax, this contention would be entitled to serious consideration, if it appeared that the free carriage of the mails is required of some but not of all merchant vessels engaged in the coastwise trade in Philippine waters. It is not open to question, however, that for purposes of taxation, the principle of uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business; but only that the burdens of taxation shall be imposed in like terms upon all persons pursuing the same vocation, or that if those occupying the same calling are divided into classes for the purpose of taxation, the basis of classification shall be reasonable and founded upon a real distinction, according to natural and well recognized lines of distinction, not merely arbitrary or capricious.

If then the burden of carrying the mails free be regarded as in the nature of an occupation tax, imposed upon the business of common carriers in Philippine waters, it cannot be said to violate the uniformity rule merely because it is made exclusively applicable to coastwise trading vessels, since it is made equally applicable to each and every vessel of this class.

In the case of De Villata vs. Stanley (G. R. No. 8154, 14 O. G., 171), after indicating that while the Acts of Congress require "uniformity" of taxation in this jurisdiction, they do not prescribe the rule of "equality" of taxation which prevails in some jurisdictions, we held that a tax imposed upon coastwise trading vessels cannot be successfully attacked for lack of uniformity so long as it is laid uniformly upon all members of the class to which it belongs. What was said then, read together with the authorities cited in the principal opinion in that case, renders it unnecessary to extend the discussion at this time.

It is suggested, however, that as between the various owners
84 of coastwise trading vessels, the requirement for the free carriage of the mails imposes an unequal burden, because the exact amount and weight of the mails to be carried by each vessel is not fixed by any definite standard. But the burden of carrying the mail is imposed in like terms upon each and every vessel entering upon the coastwise trade, and unless it can be shown that the enforcement of the law does in fact impose an inequitable and unjust burden

upon some of these vessels, not required of all members of the class, it cannot be said to lack uniformity as an occupation tax.

In the absence of a showing, we cannot say that the legislative authorities were mistaken in assuming that substantial equality in the imposition of the burden may be anticipated as a result of the operation of the natural laws of trade.

The more business is done at a particular port in the Islands, the more mail and the more ships may be expected to be dispatched to and from that port, with a consequent equitable distribution of the burden of carrying the mails between all the vessels engaged in the coastwise carrying trade.

In the recent case of the Colorado S. Ry. Co. vs. People (156 Pac., 1095, 1098), the court observed that "the human mind as yet has failed to present any method by which the burdens of taxation can be imposed accurately upon all alike." The most that can be required or expected from systems of taxation devised by human minds is substantial equality, and there is nothing in the record in this case which even remotely suggests that as between the various owners of coastwise vessels there is any substantial inequality in the imposition of the burden, having in mind the relative size and value of these vessels and the volume of business done by them.

Our statutes, like those of most states, impose burdens of service upon various classes of citizens which are in the nature of a tax, and although these services necessarily vary somewhat, they have never been successfully resisted on the ground of their lack of uniformity or of inequality. I need only refer by way of illustration to
85 the requirement of enforced labor on the public roads by all male citizens within the prescribed age limit; and the requirement of free services to pauper litigants by attorneys at law, which is to all intents and purposes a license or occupation tax imposed upon this class of professional men. In some states these services are required of all attorneys, unless relieved therefrom by the payment of a special tax in addition to the regular license tax imposed upon all members of the profession.

It may be well to add to what has been said in answer to the criticism of the statute on the ground of lack of uniformity as an occupation tax, that the power of the legislature to require coastwise vessels "to continue to carry the mails free," and thus to comply with an obligation, which is and always has been voluntarily assumed as a condition precedent to their original entry upon the coastwise carrying trade, is not necessarily or exclusively derived from the power to levy occupation taxes upon the ordinary vocations of the inhabitants of these Islands. I do not, therefore, deem it necessary to consider any question as to the power of the legislature to enact legislation requiring specific services in lieu of money taxes, upon members of a trade or occupation who are already engaged in such a trade or occupation when the statute is enacted.

As I have shown already, the obligation of service involved in the free carriage of the mails is not now and never has been required of any person until and unless it is voluntarily assumed by one who voluntarily enters the carrying trade in Philippine waters; and the

right of the state to deny original entry upon that trade to all who do not assume that obligation may be sustained on the theory that the state may make such conditions precedent as it deems proper and expedient for the enjoyment of the privilege of entering upon and engaging in this quasi public business, with the right to make use of the docks, wharves, ports, harbors and other shipping facilities furnished at public expense, primarily and more especially, for the safety and convenience of those engaged in that business.

No one questions the power of the state to collect toll for the use of public roads and bridges, or to grant a franchise to corpo-
86 rations or individuals empowering them to construct and maintain such roads and bridges, and to collect toll by way of compensation therefor. Special charges of this kind, known as dock, wharf, port, harbor, canal and pilotage fees, tonnage dues, and the like are paid without protest by merchant vessels making use of the docks, harbors, and canals of all maritime nations. Each state determines, in its discretion, the amount and character of such charges; and it seems clear that the government of the Philippine Islands may properly limit the privilege of the use of its docks, wharves, ports, and harbors in the conduct of the business of common carriers, to such vessels as agree to carry the mails free, by way of compensation, in whole or in part, for the use of these shipping facilities, furnished at public expense to those engaged in this quasi public business.

Under the conditions existing in these Islands I know of no constitutional limitation on the power of the Philippine Legislature which prohibits that body from continuing in force an immemorial practice, with the force of law, requiring the free carriage of the mails rather than the payment of a sum of money as a condition precedent to the grant of a license to enter upon the coastwise carrying trade in Philippine waters and to enjoy the privileges secured to those engaged in that business.

There is nothing in the record which would justify a finding that cash payments, much larger than that to which any of these petitioners would be entitled by way of direct compensation for the annual services rendered by them in the transportation of the mails might not lawfully be recovered from each and all of them, either by way of fees for the annual renewal of their licenses, or by way of additional charges to those now paid by them for the use of docks, wharves, ports, harbors, etc., or by way of occupation taxes in the technical and restricted meaning of that term. If the legislature were to require the payment of such an amount in cash, with a provision for the remittance of so much thereof as exceeds the amount of the license fees, tonnage dues, dockage fees, etc., now paid by any of these vessels engaged in the coastwise trade on condition
87 that such vessel would obligate itself to carry the mails free, could any constitutional objection be advanced to such obligation? I think not; and I am quite certain that no change would be wrought in the immemorial practice as to the free carriage of the mails by the enactment of such legislation.

I do not believe that the constitutionality of the immemorial

practice can be successfully challenged merely because the statutory authority upon which it rests does not expressly declare that it is now and always has been enforced, in lieu of its equivalent in cash or of a still larger amount which the state might lawfully recover, by way of fees, charges, or taxes, from those entering upon and engaging in the coastwise carrying trade.

A. C. CARSON.

Marginal Note (A)—Dissenting Opinion, G. R. No. 11899.

Counsel for the petitioners do not challenge the Attorney-General's assertion that the free transportation of the mails was required under the Spanish law in force prior to the American occupation; indeed, counsel tacitly admitted in argument both the existence and the validity, under the former sovereign, of the law relied upon by the Attorney-General. Counsel's contentions in this regard were exclusively directed to the alleged "relevancy of Spanish decrees," and, in this connection, they insisted that the constitutional questions raised by them "are in no wise affected by the terms of any decree or law of the former Spanish sovereign;" that the statute enacted by the Philippine Legislature "gathers no extra force nor effect from the prior Spanish law;" and that "no act of the Government in violation of these (constitutional) limitations can be justified upon the Spanish law or decrees prior to the constitution."

I deem it proper, nevertheless, to set out, in a marginal note, the grounds upon which I accept the Attorney-General's claim that the requirement for the free transportation of mails by coasting vessels is based on the provisions of Spanish law continued in force after the American Occupation.

88 When these petitioners were before this court in a former attempt to challenge the constitutionality of the administrative rules and orders issued under American sovereignty touching the transportation of the mails by the coasting vessels, this court said:

It is a matter of common knowledge that, under the laws and regulations in force at the time of the change of sovereignty, all vessels engaged in the coasting trade were required to carry the mails, and to furnish the postal authorities with due notice of their sailing hours, * * * and we are not advised of the enactment or promulgation of any local statute or regulation * * * which would excuse these vessels from compliance with the regulations in force under the old sovereignty with regard thereto. * * * Under the law in force in these islands at the time of the change in sovereignty, and of the enactment of the Act of Congress, the owners of all licensed coasting vessels were required to comply with regulations of this character, as one of the conditions upon which they were permitted to engage in the quasi public employment of public carriers in the interisland trade.

In that decision, we cited the following decree dated August 4, 1863, to indicate the antiquity of the Spanish practice in this regard (translated from the original Spanish):

In the matter of the investigation made for the application of the provisions now in force relative to the notice to be given to the post office of the sailings of ships, in the exceptional case of a ship just arrived in port and which has to sail immediately for the convenience of the interests of its owners or consignees.

Having considered the ordinances relating to packet boats and other royal orders and superior decrees imposing upon the *capital* of every ship the duty of giving notice to the post office four days in advance at least of the date they are to sail and the port of destination.

Considering that the actual application of such provisions might affect in a remarkable way the commercial interests in the very exceptional case spoken of, where the ship just anchored should have to set sail again before the period of four days referred to.

The capitanía del puerto, the administración general de aduanas, comandancia general de carabineros, and the administración general de correos, having been heard.

89 This superior civil government ordains: That when a ship falls within the precise exceptional case raised by the within resolution, its captain shall only be required to give, from the very instant of determining the sailing of the ship, immediate notice to the post office stating the day and hour in which the sailing must be made.

For the purposes that may be proper, let this decree be communicated to the comandancia general de marina, capitanía del puerto de Manila and Cavite, and the administración general de correos, and let same be published in the Gazette for general information Report to the government of H. M. and file. (Berriz, Diccionario de la Administración de Filipinas, 1888, vol. 1, p. 516.)

Also the degree dated January 13, 1876, as follows:

Having considered the consultation made by the comandancia general de marina proposing the amendment of section 7 of the superior decree of December 18, 1868, relative to the duty imposed upon shipowners or consignees of steamers whether national or foreign, plying between this port and the other ports of the Archipelago or China and vica versa, of giving four days' notice before the day they are to sail, to their great prejudice; and

Having considered the reports submitted by the dirección general de administración civil and the administración general de correos;

Considering the fact that since that superior order was enforced, the fortunate increase of steamers and consequently the frequent repetition of voyages made by them, is evident, and therefore, this circumstance alone would change the object or reason which at that time made it necessary to impose the duty referred to in said section 7.

Considering the importance and value at certain times of the prompt clearance of one of its ships, to a commercial firm which is at all times worthy of protection by the government.

This general Government ordains as follows:

1. The period of four days prescribed by section 7 of the superior decree of December 18, 1868, is reduced to two.

2. The shipowners or consignees of steamers, whether national or foreign, plying between this port and the other ports of the Archipelago or China and vice versa, shall give notice to the captain of the ports before midday, in order that the postoffice may have immediate notice of the sailing at an hour that may enable it to insert same in the Gazette of the next day, and the ship may sail in the afternoon of the day next following.

90 3. The office of the captain of the port will report daily to the administración general de correos all ships that at 12 o'clock, noon, may have requested the visita de salida and in the event of there being none a report shall be sent stating that fact.

4. The report of the captain of the port's office must be at that administración general before 2 o'clock, p. m., every day.

5. Captains and consignees of ships can in no case request the visita de salida without the period of forty-eight hours intervening between the time they report and the visit, so as to give opportune notice to the administración de correos.

6. The centro de correos shall send the notices to the Gazette and other newspapers, and shall post them besides on a bulletin board at the door of the postoffice. (Berriz, Diccionario de la Administración

That the Spanish practice, rules, and regulations were continued in force under American sovereignty will appear from the examination of the following extracts from the official records:

[*Extract from the Quarterly Report of the Director of Posts of the Philippine Islands to the Postmaster-General, Washington, D. C., for the Quarter Ending December* 31, 1899.]

I have decided that, for the present and for some time to come, I would continue the old Spanish law under which all steamships engaged in interinsular trade are required to carry the mail without compensation. Inasmuch as it is in the interest of steamboat owners to have mail communication, I do not consider that this action is open to criticism.

F. W. VAILLE,
Director of Posts.

[*Extract from the Report of the Director-General of Posts of the Philippine Islands to the Military Secretary, Manila, P. I., for the Fiscal Year Ending June* 30, 1901.]

The Question of regular transportation for the mails is the most important thing before us at this time. So far no contracts of any kind have been made for transportation by steamer between the several islands. Every steamer leaving a port is required to carry the mail and without compensation. The steamship business in the islands being mostly of a tramp nature, the service is very ir-

91 regular, each company operating its steamer according to the demands of its private business. Thus it is that in a given period we may have mails from Manila to a certain point nearly every day for a week, and then for the next week or ten days, and

in some cases much longer, there will be no opportunity to forward mails to the place in question.

C. M. COTTERMAN,
Director General of Posts.

Manila, October 26, 1911.

Respectfully returned to the Secretary of Commerce and Police, submitting the following summary of the question of requiring vessels engaged in the interisland trade to carry the mails free.

Upon taking charge of the Philippine Postal Service in December, 1900, I found that my predecessor, who came here as a representative of the United States Post Office Department in 1898, had shortly after his arrival here reported to the Postmaster General that the Spanish law required all such vessels to carry the mails free, and that since he understood this law to be still in effect the practice would be continued. This was being done upon my arrival, and has continued ever since.

* * * * * * *

C. M. COTTERMAN,
Director General of Posts.

Resolution of the Philippine Commission dated April 30, 1906:

The question was presented to the Commission as to the laws and circumstances under which the steamers engaged in the interisland traffic are now and have been heretofore required to carry the mail between interisland ports. It appeared that the Spanish law required them to carry the mail in all cases, and that compensation was made only on certain routes, which were awarded by competitive bidding. It being the opinion of the Commission that the Spanish law as now enforced imposed no undue hardship upon steamship companies, considering the large benefits received by them from the special privileges of carrying on commerce in Philippine waters, the erection of new lighthouses and lights, and the maintenance thereof, the improvement of harbors and ports, and the recent abolition of all entrance and clearance fees, and that the requirement of free transportation of mails ought to be in the form of a law and made en-
92 forceable by the suspension, revocation, or withholding of license for the privileges of engaging in the interisland trade.

On motion it was resolved, That the Insular Collector of Customs and the Director of Posts be directed to prepare and submit to the Commission such a bill as will accomplish the desired results.

In the absence of any challenge as to the provisions of the Spanish law requiring the carrying of mail free of charge by coasting vessels, despite the iteration and reiteration of the Government's claim that such was in fact the law under the former sovereign, it would seem to be unnecessary to extend the discussion, but in view of the foregoing citations, it may be well to add the following citations of authority as to the force of custom and usage in Spain and her dependencies:

Usages long established and followed have to a great extent the

efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments. In Spain and in her dependencies great weight is given to such usages in the adjustment of rights of property. "Legitimate custom," says Escriche, "acquires the force of law not only when there is no law to the contrary, but also when its effect is to abrogate any former law which may be opposed to it, as well as to explain that which is doubtful. Hence it is said that there may be a custom without law, in opposition to law, and according to law." (Escriche's Derecho Español, 23, 24; Panaud vs. Jones, 1 Cal., 499; Slidell vs. Grandjean, 111 U. S., 412, 421).

There is another source of law in all governments' usage, custom, which is always presumed to have been adopted with the consent of those who may be affected by it. * * * A general custom is a general law, and forms the law of a contract on the subject matter, though at variance, with its terms, enters into and controls its stipulations, as an act of parliament or state legislature. (Cases cited.) The courts not only may, but are bound to notice and respect general customs and usage, as the law of the land, equally with the written law, and when clearly proved, they will control the general law; this necessarily follows from its presumed origin—an act of parliament of a legislative act. (U. S. vs. Arredondo, 6 Pet., 691, 715.)

93 On January 24, 1918, the parties were duly notified of the foregoing decision, and on February 4, 1918, the Solicitor-General, for the respondent, filed his exception to the above order and judgment of the Court reading as follows:

THE UNITED STATES OF AMERICA,
Philippine Islands:

(In the Supreme Court of the Philippine Islands.)

[G. R. No. 11899.]

YNCHAUSTI & COMPANY, COMPAÑÍA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT & COMPANY, FERNANDEZ HERMANOS, Petitioners,

versus

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Respondent.

Exception.

Comes now the respondent in the above-entitled case, by the undersigned its attorney, and excepts to the order and judgment of this honorable court entered herein under date of January 23, 1918, revoking and setting aside the order of the respondent requiring the petitioners to comply with the law relative to the carriage of the mails.

QUINTIN PAREDES,
Solicitor-General.

Manila, February 2, 1918.

The foregoing exception of the Solicitor-General was considered by the Supreme Court in its session of February 5, 1918, ordering that the same be recorded as duly interposed and attached to the record of the case.

On February 2, 1918, the Solicitor-General, counsel for the respondent, filed the following petition for rehearing.

UNITED STATES OF AMERICA,
Philippine Islands:

(In the Supreme Court of the Philippine Islands.)

[G. R. No. 11899.]

YNCHAUSTI & COMPANY, COMPAÑÍA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT & COMPANY, FERNANDEZ HERMANOS, Petitioners,

versus

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Respondent.

94 *Petition for Rehearing.*

Now comes the respondent in the above-entitled case, by the undersigned its attorney, and petitions this honorable court to grant a rehearing in this case for the following reasons:

I.

The court has erred in holding that the law and established custom in force in this jurisdiction requiring vessels engaged in the coastwise trade and vessels plying between Philippine ports to carry the mail without direct compensation contravenes the Philippine Organic Act.

II.

The court has erred in holding that these petitioners have been deprived of any property right or interest.

III.

The court has erred in revoking and setting aside the order of the respondent requiring these petitioners to comply with the law and their contractual obligation to continue to carry the mail without additional compensation.

QUINTIN PAREDES,
Solicitor-General for the Respondent.

Manila, February 1, 1918.

Thereafter, the Supreme Court, in its session of March 15, 1918, entered the following minute order:

Upon consideration of the motion of the Solicitor-General praying, for the reasons therein stated, for a rehearing in case No. 11899, Ynchausti & Co., et al., vs. The Board of Public Utility Commissioners, the court resolved that said motion for a rehearing be denied. Mr. Justice Fisher did not sit in the consideration of the motion.

Thereafter, on March 18, 1918, the Solicitor-General for the respondent filed an exception to the order of the court overruling and denying his motion for a rehearing under date of March 15, 1918.

Said exception of the Solicitor-General was considered by the
95 court in its session of March 20, 1918, ordering that the same be recorded as duly interposed and attached to the record of the case.

On the same date, March 18, 1918, the Solicitor-General, for the respondent, filed the following petition:

THE UNITED STATES OF AMERICA,
Philippine Islands:

(In the Supreme Court of the Philippine Islands.)

[G. R. No. 11899.]

YNCHAUSTI & Co. et al., Petitioners,

versus

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Respondent.

Comes now the respondent in the above-entitled case and respectfully states and shows to this honorable court:

That said respondent is desirous of petitioning the Supreme Court of the United States for the allowance of writ of certiorari for the review and revision of the judgment and order heretofore entered by this court in the above-entitled case;

That for the purpose of presenting said petition, it is necessary that the entire record herein be certified unto said court by the clerk of this court;

That to accomplish this purpose and to transmit the said record to the United States, additional time will be required over and above the period of thirty days granted by this court for the entry of final order for the execution of said judgment, which said period expires on April 15, 1918.

Wherefore, the respondent prays that this record be retained by this honorable court for the period of two months from April 15, 1918, or until the further order of this honorable court.

QUINTIN PAREDES,
Solicitor-General, for the Respondent.

Manila, P. I., March 18, 1918.

Copy sent Charles C. Cohn, esq., attorney for petitioners.

Thereafter, on March 20, 1918, the Supreme Court instructed the clerk of court to retain in his office the record of the above-entitled case for a period of two months from the 15th of April, 1918.

96 Thereafter, on April 15, 1918, the clerk of the Supreme Court of the Philippine Islands entered the final judgment in the case, which is as follows:

THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

[G. R. No. 11899. April 15, 1918.]

YNCHAUSTI & COMPANY, COMPAÑÍA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT & COMPANY, and FERNANDEZ HERMANOS, Petitioners,

versus

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Respondent.

Judgment.

The court having regularly acquired jurisdiction for the trial of the above-entitled cause submitted by both parties for decision, after consideration thereof by the court upon the record, its decision and order for judgment having been filed on the 23d day of January, A. D. 1918.

By virtue thereof it is hereby adjudged and decreed that a judgment be entered nullifying and setting aside the order issued by the Board of Public Utility Commissioners. And without any finding as to costs.

[SEAL.]

V. ALBERT,
Clerk of the Supreme Court
of the Philippine Islands.

Certified correct:

[Seal Corte Suprema, Islas Filipinas.]

V. ALBERT,
Clerk of the Supreme Court
of the Philippine Islands.

97 THE UNITED STATES OF AMERICA,
Philippine Islands:

Supreme Court of the Philippine Islands.

I, V. Albert, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing ninety-six (96) printed pages contain a true and correct translation and transcript of the record

and proceedings in the Supreme Court of the Philippine Islands in the case of Ynchausty & Company, Compañía General de Tabacos de Filipinas, J. M. Poizat & Company and Fernandez Hermanos, Petitioners, versus The Board of Public Utility Commissioners, Respondent, for a petition for review the order entered by the Board of Public Utility Commissioners in its case No. 781, bearing No. 11899 on the docket of this Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Philippine Islands, this fourth day of May, A. D. nineteen hundred and eighteen.

[Seal Corte Suprema, Islas Filipinas.]

V. ALBERT,
Clerk of the Supreme Court
of the Philippine Islands.

98 In the Supreme Court of the United States, October Term, 1918.

No. 618.

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Petitioner,

v.

YNCHAUSTI AND COMPANY, COMPAÑIA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT AND COMPANY, and FERNANDEZ HERMANOS, Respondents.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of record on file in the office of the Clerk of the Supreme Court of the United States shall constitute the return of the Clerk of the Supreme Court of the Philippines to the writ of certiorari issued herein.

(Sgd.) CHESTER J. GERKIN,
Counsel for Petitioner.

(Sgd.) CHARLES C. COHN,
Counsel for Respondents.

I, V. Albert, do hereby certify that the foregoing is a true and correct copy of the original filed in my office.

[Seal Corte Suprema, Islas Filipinas.]

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

99 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

I, V. Albert, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the original of the attached stipulation was filed in my office on the twenty-third day of December, 1918, by the attorneys of the respective parties in case No. 618 (R. G. 11899) entitled The Board of Public Commissioners, Petitioner, vs. Ynchausti and Company, Compañia General de Tabacos de Filipinas, J. M. Poizat and Company, and Fernandez Hermanos, Respondents; and in obedience to the Writ of Certiorari issued by the Supreme Court of the United States, dated the twenty-first day of October, 1918, I hereby transmit the same to the Supreme Court of the United States this twenty-sixth day of December in the year of our Lord one thousand nine hundred and eighteen.

[Seal Corte Suprema, Islas Filipinas.]

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

100 Supreme Court, Philippine Islands, Clerk's Office. Received Dec. 23, 1918, 11:55 A. M.

In the Supreme Court of the United States, October Term, 1918.

No. 618.

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, Petitioner,

v.

YNCHAUSTI AND COMPANY, COMPANIA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT AND *and* COMPANY, and FERNANDEZ HERMANOS, Respondents.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of record on file in the office of the Clerk of the Supreme Court of the United States shall constitute the return of the Clerk of the Supreme Court of the Philippines to the writ of certiorari issued herein.

CHESTER J. GERKIN,
Counsel for Petitioner.
CHARLES C. COHN,
Counsel for Respondents.

101 Supreme Court, Philippine Islands, Clerk's Office. Received Dec. 23, 1918, 11:55 A. M.

11899.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the Philippine Islands, Greeting:

Being informed that there is now pending before you a suit in which Ynchausti & Company, Compania General de Tabacos de Filipinas, J. M. Poizat & Company and Fernandez Hermanos are petitioners, and The Board of Public Utility Commissioners is respondent (G. R. No. 11899), (Petition for review), and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States,
102 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26,704. Supreme Court of the United States. No. 618, October Term, 1918. The Board of Public Utility Commissioners vs. Ynchausti & Company et al. Writ of Certiorari.

103 [Endorsed:] File No. 26,704. Supreme Court U. S., October Term, 1918. Term No. 618. The Board of Public Utility Commissioners, Petitioner, vs. Ynchausti & Company et al. Writ of certiorari and return. Filed April 15, 1919.

No. _____

In the Supreme Court of the United States

October Term, 1918.

BOARD OF PUBLIC UTILITY COMMISSIONERS,
Petitioner,

VERSUS

YNCHAUSTI & CO., ET AL., Respondents.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS, AND BRIEF IN SUPPORT THEREOF.

CHESTER J. GERKIN,
Attorney for Petitioner.

MANILA
BUREAU OF PRINTING
1918

No.....

In the Supreme Court of the United States

October Term, 1918.

BOARD OF PUBLIC UTILITY COMMISSIONERS,
Petitioner,

VERSUS

YNCHAUSTI & CO., ET AL., Respondents.

NOTICE.

CHARLES C. COHN, Esq.,
Manila, Philippine Islands.

SIR: Please take notice that on Monday, the ..... day of ....., 1918, upon the coming in of the court on that day, we will submit a petition for a writ of certiorari directed to the Supreme Court of the Philippine Islands, in the above entitled cause.

Manila, P. I., June 29, 1918.

CHESTER J. GERKIN,
Attorney for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition for writ of certiorari and brief in support of the petition are hereby acknowledged this 29th day of June, 1918.

CHARLES C. COHN,
Attorney for Respondents.

No.....

In the Supreme Court of the United States

October Term, 1918.

BOARD OF PUBLIC UTILITY COMMISSIONERS,
Petitioner,

VERSUS

YNCHAUSTI & CO., ET AL., Respondents.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS, AND BRIEF IN SUPPORT THEREOF.

To the Honorable
The Supreme Court of the United States:

SUMMARY.

On June 7, 1916, the respondents, who were engaged in the coastwise trade of the Philippine Islands, brought, in pursuance of section 37 of Act No. 2307 of the Philippine Legislature, an original proceeding against petitioner in the Supreme Court to annul and set aside petitioner's decision in case No. 781 commanding respondents, in pursuance of the law and usage of said Islands, to continue to carry the mail free (record, pp. 3–7); and on January 23, 1918, the said court,[1] with Mr. Justice Carson dissenting, decided

[1] Only six of the nine members of the court took part in this case. Justices Avanceña and Fisher had been of Counsel in the hearing before the Board of Public Utility Commissioners.

the case against petitioner, holding that section 309 of the Administrative Code,[1] which is a mere codification of an ancient law, requiring vessels engaged in the Insular coastwise trade to carry the mail free, was repugnant to the provisions of the Organic Law of the Philippine Islands, in that it constituted an unconstitutional taking of private property for public use without just compensation. (Record, p. 60, *et seq.*) Petitioner excepted to the decision of said court (record, p. 93) and on February 2, 1918, filed a motion for a rehearing (record, p. 94) which was denied by said court on the 15th of March, 1918 (record, p. 94), petitioner excepting and notifying its intention to apply to this court for a writ of certiorari. Thereafter, on April 15, 1918, the Insular Supreme Court entered final judgment in the case (record, p. 96).

SHORT STATEMENT OF THE MATTER INVOLVED.

On May 4, 1916, the respondents served notice on the Director of Posts of the Philippine Islands that on and after June 1, 1916, they would decline to carry mail on their vessels plying between Philippine ports under the terms and conditions imposed by law and long-established custom. The Director of Posts referred said notice to the Board of Public Utility Commissioners, which body was charged with the duty of seeing that public utilities complied with the laws of the Philippine Islands, with the request that an order be issued directed to said respondents commanding them to comply with the laws governing said service. On June 1, 1916, said Board, after citing the parties and due hearing of the matter, entered its decision and order requiring the respondents to continue to carry the mails in accordance with the laws and the terms of the license whereby they were authorized to engage in the coastwise trade of the Philippine Islands.

Thereafter the respondents petitioned the Supreme Court of the Philippine Islands to review said order, and on January 23, 1918, said Court entered its judgment revoking and setting aside the order of this petitioner on the ground

[1] See Appendix A.

that "the law upon which it is based is in direct contravention of the provisions of the Organic Law of the Philippines, which prohibits the taking of private property for public use without just compensation." [1]

It results, therefore, that the sole question propounded by the case is the validity of that part of section 309 of the Administrative Code of the Philippine Islands (section 568 of the Administrative Code as amended by Act No. 2711) which provides that "vessels engaged in the coastwise trade and vessels plying between Philippine ports *shall continue* [italics ours] to carry mail free;" or, in other words, whether the Philippine Organic Act invalidates said provision of the Administrative Code and the antecedent law and usage relating to the subject matter.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

That according to section 27 of the Act of Congress approved August 29, 1916, in connection with section 5 of the Act of Congress approved September 6, 1916, this court has jurisdiction by certiorari or otherwise, to require that there be certified to it for review and determination any cause decided by the Supreme Court of the Philippine Islands "in which the Constitution or any statute, * * * of the United States is involved, or in causes in which the value in controversy exceeds $25,000, * * *."

II.

That the Acts of Congress of July 1, 1902, and August 29, 1916, as construed and applied by the Insular Supreme Court in this case, repealed and annulled the law and usage in force in this jurisdiction for generations requiring vessels engaged in the coastwise trade to carry mail without direct compensation for such service, a result obviously never intended by Congress.

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[1] Although the court reserved the right of "writing an opinion in which the facts and the law shall be more fully discussed" (record, p. 60), no additional opinion has been filed, and, under the practice of the court, it is believed none will be.

III.

That the judgment entered and principles adopted by the Insular Supreme Court in this case are at variance with the decisions of this court; and said judicial precedent constitutes a dangerous departure from established jurisprudence and governmental practice, in that:

(*a*) It entirely disregards the contractual duty and voluntary obligation assumed by vessels taking out a license to engage in the Philippine coastwise trade;

(*b*) It abruptly changes the established policy of this Government in dealing with said subject matter;

(*c*) It deprives the legislative branch of the right to continue in force the time-honored law and usage with respect to a subject matter peculiarly within its province;

(*d*) It requires the Government of the Philippine Islands to pay annually many thousands of pesos for the carriage of the interisland mail, which under the law and terms of its contract with respondents it should not be required to pay.

Wherefore, your petitioner respectfully prays for a writ of *certiorari* to the Supreme Court of the Philippine Islands in the case therein entitled Ynchausti & Co. et al., petitioners, *versus* Board of Public Utility Commissioners, respondent, No. 11899, to the end that same may be reviewed and determined by this court as provided in section 5 of the Act of Congress entitled "An Act to amend the Judicial Code," etc., approved September 6, 1916, and that the said judgment of the Supreme Court of the Philippine Islands in the said case may be reversed by this Honorable Court.

CHESTER J. GERKIN,
Attorney for Petitioner.

UNITED STATES OF AMERICA,
PHILIPPINE ISLANDS,
CITY OF MANILA. } *ss.*

Chester J. Gerkin, being duly sworn, says that he was one of the attorneys and counsel in the Supreme Court of the Philippine Islands for the petitioner herein, that

he prepared and has read the foregoing petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

CHESTER J. GERKIN.

Subscribed and sworn to before me this 24th day of June, 1918. Affiant exhibited cedula No. F–57185 issued at Manila, March 2, 1918.

[SEAL.] ALVA J. HILL,
Notary Public.
My commission expires December 31, 1918.

Doc. No. 214.
Page No. 44.
1 Ser. 1918.

MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI.

This proceeding was instituted by the Philippine shipping firms of Ynchausti & Co., Compañía General de Tabacos de Filipinas, J. M. Poizat & Co., and Fernandez Hermanos, pursuant to the provisions of section 37 of Act No. 2307 of the Philippine Legislature, for judicial review of a decision of the Board of Public Utility Commissioners. On June 1, 1916, the said Board, after due hearing, entered an order commanding the above-named public utilities to comply with the law and perform their duty in the matter of carrying mail on vessels operated by them between Philippine ports.

The law in force in the Philippines at the time of the change of sovereignty from Spain to the United States required all vessels engaged in the interisland trade to carry the mail without compensation (record, pp. 87–92; and Appendix B). This requirement and practice was continued by the present Government, and no question was raised regarding its legality until these respondents refused to carry the mail without direct compensation therefor, claiming that the law requiring this service was unconstitutional.

I.

The respondents have not been deprived of any property right or interest.

In his dissenting opinion in this case Mr. Justice Carson said:

> Under the law in force in the Philippine Islands prior to the change of sovereignty from Spain to the United States in 1898, the right of merchant vessels to enter upon and to engage in the coastwise carrying trade was conditioned upon their obligating themselves to carry the mails free of charge, under such reasonable regulations as might be prescribed by competent authority. This requirement as to the free transportation of the mail by merchant vessels in the coastwise trade is said to have been in force from time immemorial; and certain it is that the existence of a custom or a practice of this kind, with the force of law, can be traced in the Spanish decrees through a period of more than half a century. (Cf. Marginal note A.)
>
> After the change of sovereignty in 1898, the practice of requiring these vessels to carry mails free of charge was continued in force; * * *. (Rec. pp. 64–65.)
>
> * * * every shipowner who has entered the coastwise trade in the Philippines has done so with full knowledge of the local governmental policy and of the provisions of the Spanish laws continued in force under the American occupation, whereby their original entry upon the coastwise carrying trade was conditioned upon their assumption of the obligation of carrying the mails free so long as they continue in that business. (Rec. p. 73.)

This is not a case where a new burden or added restriction has been imposed upon an existing business. The law and established custom relating to the carriage of mail by marine carriers constitutes a part of the Philippine coastwise license. In engaging in the coastwise trade these respondents voluntarily obligated themselves to transport mail between Philippine ports of call without direct compensation therefor as a condition of their entry upon said business. And having engaged in the Philippine coastwise trade while this law and custom was in force, they have been deprived of no property right or interest. Interisland vessels never possessed any property right to collect toll for carrying mail. No direct compensation or payment

has ever been made for this service. Hence no vested right has been impaired or assailed.

The carriage of the mails is a Government monopoly; it is a function assumed and controlled by the State. There is no analogy between the transportation of mail and that of freight or passengers. The basis for the distinction made is obvious and fully justified. It has been held that a transportation company is not a common carrier in respect to such service when carrying mail—either as a duty imposed by statute or under a contract with the Government. (Bankers' Mutual Casualty Co. *vs.* Minneapolis, St. P. & S. S. M. Ry. Co., 117 Fed., 434). In the case of Atchison, T. & S. F. Ry. Co. *vs.* United States (225 U. S. 640, 649), this honorable Court observed:

> For, public policy requires that the mail should be carried subject to postal regulations, and that the Department, and not the railroad should, in the absence of a contract, determine what service was needed and under what conditions it should be performed. The company in carrying the mails was not hauling freight, nor was it acting as a common carrier, with corresponding rights and liabilities but in this respect it was serving as an agency of government, and as much subject to the laws and regulations as every other branch of the post-office.

Every resident of the Philippine Islands is a patron and beneficiary of the postal service. And this service requirement being imposed alike upon all vessels documented in the coastwise trade, there is no discrimination or lack of uniformity in its operation.

These respondents and others similarly situated having applied for and accepted licenses authorizing them to operate vessels in the Philippine coastwise trade subject to this service requirement, have no cause for complaint regarding the conditions prescribed and assumed. The decisions of this court in the cases of Interstate Consol. St. R. Co. *vs.* Massachusetts (207 U. S. 79); Sutton *vs.* State (244 U. S. 258); International & Great Northern Ry. Co. *vs.* Anderson County, City of Palestine, George A. Wright et al. (No. 243, October term, 1917) decided April 15, 1918, are conclusive of this proposition.

II.

The legislation and usage in question is not in conflict with the Philippine Organic Act.

The Insular Supreme Court held that the law requiring marine carriers operating vessels in the Philippine coastwise trade to carry the mail free is invalid as being contrary to the provisions of the Organic Law of the Philippines, which prohibits the taking of private property for public use without just compensation. (Rec. p. 60.) Said act provides that,—"Private property shall not be taken for public use without just compensation." (Section 3, Act of Congress, approved August 29, 1916.) This language was taken from the fifth amendment to the Constitution of the United States. It will be noted that the law and established practice requiring vessels engaged in the Philippine coastwise trade to carry mail without direct compensation was in force at the time of the passage of the Philippine Organic Act. And said act provides that "the laws now in force in the Philippines shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States." (*Id.* section 6.)

There is nothing novel or extraordinary in principle about this service requirement of these public service corporations. It is not essentially different from the requirement that citizens labor without compensation in building and maintaining public roads, and that public service companies furnish public officers free transportation, etc. Certainly, this requirement cannot be said to be violative of the genius or spirit of American institutions; nor repugnant to the "great principles of liberty and law" which was "made the basis of our governmental system."

Whether this long continued practice is in accord with the policy followed in some other jurisdictions, or is wise or expedient, is not here a matter of concern. To the national whose state has adopted and followed a different policy, the Philippine practice may seem inadvisable. Re-

ferring to another matter in which the American and Philippine methods differed, this court, in the recent case of Ibañez de Aldecoa *vs.* The Hongkong and Shanghai Banking Corporation, et al. (No. 230, October Term, 1917), decided April 29, 1918, observed (italics ours): "The value and extent of both rights this court has had occasion to declare in Darlington *vs.* Turner (202 U. S. 195, 230, et seq.) and in view of that case we are forced to think, that, however our habits may induce us *to approve the American system* of the relation of parent and child and that there should be interposed between them when property interests are involved the order of a court and the security of bonds, there are other people—including a State of this Union—who have found that they could rely with confidence on other than material considerations for the performance of duty and that 'filiation' could stand in lieu of 'those legal safeguards' with which the new code of procedure 'envelops the property of a minor child.'"

In view of the peculiar conditions surrounding interisland shipping, the Legislature has so far declined to change the policy originally inaugurated by Spain and to which the business has adapted itself. Old burdens may be irksome, but legislative experience shows that changes in duties and requirements, especially if the particular service or benefit goes to the state, are rarely welcomed. Said this court in Bunting *vs.* Oregon (243 U. S., 426, 438); "New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions, and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal."

It will be noted that the Philippine Legislature gave special consideration to this practice quite recently and saw fit to incorporate a provision covering the prior law and custom into its codification of local administrative law. (Sec. 309, Act No. 2657, known as the Administrative Code. Reënacted as section 568, Act No. 2711.) The two decades

of American sovereignty, not to mention previous experience, has demonstrated to the satisfaction of the Philippine Legislature that the requirement of this service is neither confiscatory nor unreasonable. The proverbial saying that "the proof of the pudding lies in the eating" is applicable. Our Philippine coastwise tonnage has increased and shipping firms have enjoyed considerable prosperity during this time. At the hearing of case No. 809 before the Board of Public Utility Commissioners the manager of Ynchausti & Co. testified that said firm realized a profit of 30 per cent annually from the operation of one of its vessels engaged in the coastwise trade (14 Official Gazette, 2072, 2073).

There has been no showing that these marine carriers are suffering any special inconvenience by reason of this requirement; and unless this legislation is found to be inherently unreasonable and confiscatory its validity must be sustained. The customs and habits of a community are proper factors for consideration in determining the constitutionality of legislation. The annullment of this law and the resultant change of a practice considered valid and followed in this jurisdiction for many decades should not be accomplished without compelling reasons therefor. The law and usage in question has the sanction of the legislative branch of the government, the body primarily invested with authority to determine what laws are in the public interest. As observed by this honorable court in the case of Missouri, Kansas & Texas Ry. Co. *vs.* May (194 U. S., 267, 270), * * * it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." And in the case of Weems *vs.* United States (217 U. S. 349, 379): "The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety."

Where a provision has been incorporated in a statute for many years, and never contested, it will not be declared unconstitutional. The language used by Mr. Webster in reference to the force of established government practice,

quoted by this court in Parson *vs.* United States (167 U. S., 324, 330–331) is applicable to this case: "Although as an original question he would have had a different opinion, yet in view of the action of Congress and the practice of the Government, he said: 'I regard it as a settled point, settled by construction, settled by precedent, settled by the practice of the Government, settled by legislation;' and he did not ask to disturb it."

The apparently erroneous construction given the Philippine Organic Act by the Insular Supreme Court in this case will deprive the Government of the Philippine Islands of a service to which it is entitled from vessels documented in the coastwise trade, which presumably the Legislature took into consideration in fixing license fees, etc.; and the precedent established is replete with possibilities for mischief and confusion in connection with obligations assumed by those accepting franchises and licenses in this jurisdiction.

CONCLUSION.

Although there are other considerations which might be advanced in support of our view that these respondents have not been deprived of any property rights and that the Insular Supreme Court misapplied the provisions of the Philippine Organic Act, some of which are set out in the dissenting opinion of Mr. Justice Carson found at pp. 60–92 of the accompanying record, we believe that the acceptance of licenses to engage in the Philippine coastwise trade while this governmental practice obtained is conclusive of the issue here presented; and that same furnishes an impregnable foundation for our prayer that a writ of certiorari be issued to the Supreme Court of the Philippine Islands, and that the judgment entered by said court in this case be reversed.

Respectfully submitted.

CHESTER J. GERKIN
Attorney for Petitioner.

MANILA, P. I., *June 25, 1918.*

APPENDIX A.

SECTIONS OF THE ADMINISTRATIVE CODE (ACT NO. 2711 OF THE PHILIPPINE LEGISLATURE) RELATING TO THE PHILIPPINE COASTWISE TRADE.

SEC. 1206. *Vessels eligible for coastwise trade.*—The right to engage in the Philippine coastwise trade is limited to vessels carrying a certificate of Philippine register.

SEC. 1207. *License for coastwise trade.*—Vessels engaged in the coastwise trade except boats of five tons gross or less must be duly licensed annually.

SEC. 1208. *Philippine coastwise emblem.*—Vessels engaged in the Philippine coastwise trade shall fly at the mainmast the Philippine coastwise emblem, consisting of a rectangular white flag with one blue and one red star ranged from staff to tip in the horizontal median line.

SEC. 1209. *Transportation of passengers and merchandise between Philippine ports.*—Passengers shall not be received at one Philippine port for any other such port by a vessel not licensed for the coastwise trade, except upon special permission previously granted by the Insular Collector; and subject to the same qualification, merchandise embarked at a domestic port shall not be transported by water to any other port in the Islands, either directly or by way of a foreign port, or for any part of the voyage, in any other vessel than one licensed for the coastwise trade.

SEC. 568. *Authority of Insular officials to make contracts.*—Written contracts not within the purview of the preceding section shall, in the absence of special provision, be executed, with the approval of the proper Department head, by the chief of the Bureau or Office having control of the appropriation against which the contract would create a charge; or if there be no such chief, by the proper Department head himself or the Governor-General, as the case may require.

Contracts on behalf of the Insular Government with companies operating vessels engaged in the coastwise trade to secure the carriage of freight and passengers for the Government shall be executed by the Secretary of Commerce

and Communications, subject to such restrictions as may be prescribed by law; but vessels engaged in the coastwise trade and vessels plying between Philippine ports shall continue to carry mail free.

[NOTE.—Section 568 of Act No. 2711 is the same as section 309 of Act No. 2657.]

APPENDIX B.

EXCERPTS FROM OFFICIAL REPORTS SHOWING ADMINISTRATIVE RULINGS RELATIVE TO THE LAW AND USAGE REQUIRING VESSELS ENGAGED IN THE PHILIPPINE COASTWISE TRADE TO CARRY MAIL.

[Extract from the quarterly report of the Director of Posts of the Philippine Islands to the Postmaster-General, Washington, D. C., for the quarter ending December 31, 1899.]

I have decided that, for the present and for some time to come, I would continue the old Spanish law under which all steamships engaged in interinsular trade are required to carry the mail without compensation.

(Sgd.) F. W. VAILLE,
Director of Posts.

[Extract from the report of the Director-General of Posts of the Philippine Islands to the Military Secretary, Manila, P. I., for the fiscal year ending June 30, 1901.]

The question of regular transportation for the mails is the most important thing before us at this time. So far no contracts of any kind have been made for transportation by steamer between the several islands. Every steamer leaving a port is required to carry the mail and without compensation. The steamship business in the islands being mostly of a tramp nature, the service is very irregular, each company operating its steamer according to the demands of its private business. Thus it is that in a given period we may have mails from Manila to a certain point nearly every day for a week, and then for the next week or ten days, and in some cases much longer, there will be no opportunity to forward mails to the place in question.

(Sgd.) C. M. COTTERMAN,
Director General of Posts.

MANILA, *October 26, 1911.*

Respectfully returned to the Secretary of Commerce and Police, submitting the following summary of the question

of requiring vessels engaged in the interisland trade to carry the mails free.

Upon taking charge of the Philippine Postal Service in December, 1900, I found that my predecessor, who came here as a representative of the United States Post Office Department in 1898, had shortly after his arrival here reported to the Postmaster General that the Spanish law required all such vessels to carry the mails free, and that since he understood this law to be still in effect the practice would be continued. This was being done upon my arrival, and has continued ever since.

(Sgd.) C. M. COTTERMAN,
Director of Posts.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 190

THE BOARD OF PUBLIC UTILITY COMMISSIONERS,
PETITIONER,

vs.

YNCHAUSTI & COMPANY, COMPANIA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT & COMPANY, AND FERNANDEZ HERMANOS, RESPONDENTS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

ALEX. BRITTON,
EVANS BROWNE,
Counsel for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 618.

THE BOARD OF PUBLIC UTILITY COMMISSIONERS,
PETITIONER,

vs.

YNCHAUSTI & COMPANY, COMPANIA GENERAL DE TABACOS DE FILIPINAS, J. M. POIZAT & COMPANY, AND FERNANDEZ HERMANOS, RESPONDENTS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

A petition for certiorari and brief in support thereof having been filed herein by the Board of Public Utility Commissioners of the Philippine Islands, this brief is submitted on behalf of the respondents and in opposition to the granting of the writ of certiorari.

Briefly stated, the facts as disclosed by the record herein are as follows:

Respondents, Ynchausti & Company, Compania General De Tabacos De Filipinas, J. M. Poizat & Company, and Fernandez Hermanos, are steamship companies engaged in the coastwise trade of the Philippine Islands. After the change of sovereignty from Spain to the United States, and until June 1, 1916, respondents carried the mails free, continuing for that period of time the former practice under the Spanish régime. Respondents never admitted the right of the present Government to require such service, and several times sought to obtain a determination of the question (testimony of Charles C. Cohn, Rec., pp. 48-49).

March 1, 1916, the Governor General, by proclamation, made effective section 309 of Act No. 2657 of the Philippine Legislature, which provided as follows:

> "Contracts on behalf of the Insular Government with companies operating vessels engaged in the coastwise trade to secure the carriage of freight and passengers for the Government shall be executed by the Secretary of Commerce and Police, subject to such restrictions as may be prescribed by law; but *vessels engaged in the coastwise trade and vessels lying between Philippine ports shall continue to carry mail free.*" (Rec., pp. 9-10.)

May 4, 1916, respondents served notice upon the Director of Posts, Manila, Philippine Islands, that on and after June 1, 1916, they would decline to carry mail matter unless paid for such service (Rec., p. 19). The Board of Public Utility Commissioners thereupon, upon the complaint of the Director of Posts, held a hearing at which testimony was offered and both sides were heard, the steamship companies contending in their argument that the act in question was unconstitutional and invalid (Rec., pp. 11-50). The Board of Public Utility Commissioners rendered its decision to the effect that it had power only to enforce the law as it stood, namely, section 309 of Act No. 2657, and ordered the respondents to comply with the provisions of said act and to carry

the mails free (Rec., pp. 50-56). Respondents then petitioned the Supreme Court of the Philippine Islands, in accordance with the law and practice of that court, to require the Board of Public Utility Commissioners to certify to the court the record of all proceedings in said case (Rec., pp. 4-7). Such order was issued, and the proceedings were duly certified to the Supreme Court of the Philippine Islands (Rec., p. 8). The case was twice argued, and on January 23, 1918, the Supreme Court rendered its decision, holding that section 309 of the Administrative Code (Act No. 2657; section 568, Act No. 2711), requiring respondents to carry the mails free was, and is, "in direct contravention of the provisions of the organic law of the Philippines, which prohibits the taking of private property for public use without just compensation," and therefore invalid.

It is to review this decision that the Board of Public Utility Commissioners, petitioner here, seeks to have this court issue its writ of certiorari.

Petitioner's contentions, in its brief in support of petition for certiorari, are first, that "the respondents have not been deprived of any property right or interest," and second, that "the legislation and usage in question is not in conflict with the Philippine Organic Act."

These two general and broad conclusions seem to rest entirely on one specific contention (which was also the basis of the dissenting opinion filed by Justice Carson of the Philippine Supreme Court), namely, that the law in force in the Philippine Islands under the sovereignty of Spain required vessels to carry the mails free; that after the change in sovereignty in 1898, this practice was continued in force; that every ship owner who has entered the coastwise trade has done so with full knowledge of the conditions; and that "the acceptance of licenses to engage in the Philippine coastwise trade while this governmental practice obtained, is conclusive of the issue here presented." The "issue presented" being the constitutionality of the act of the Philippine Legis-

lature requiring respondents to carry the mails free, it would seem that petitioner's argument is that the circumstances and conditions described (*which do not appear in the record*) prevent the Supreme Court of the Philippine Islands from declaring an unconstitutional statute to be unconstitutional.

The simple question is: Has the Philippine Legislature power and authority to require respondents as common carriers to carry mails free of charge?

The legislature of the Philippine Islands is not, and never has been, supreme, in the sense of having unlimited powers. The Congress of the United States, of which the Philippine Legislature is the creature, and from which it must derive its only powers, has placed express limitations upon those powers. The expression of those limitations is to be found in the act of Congress of July 1, 1902, and in the President's instructions to the Philippine Commission, ratified and incorporated into the fundamental law by the said act of July 1, 1902. These limitations, in so far as they concern the present inquiry, are: "That private property shall not be taken for public use without just compensation." (President's Instructions April 7, 1900; Act of Congress of July 1, 1902, Sec. 1.) "That no law shall be enacted in said Islands which shall deprive any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the law."

"That the rule of taxation in said Islands shall be uniform." (Act of Congress of July 1, 1902, Sec. 3.)

The constitutional question which is thus presented by the act of July 1, 1902, is in no wise affected by the terms of any decrees or laws of the former Spanish Sovereignty. The validity of the requirement of free mail service is dependent upon the validity of Act No. 2657. If the latter act is valid legislation, the requirement of the Government needs no other sanction than this legislative provision, and gathers no extra force or effect from the prior Spanish law. If, however, the requirement of free mail service in said Act 2657

is invalid and unconstitutional, the said requirement is invalid and unconstitutional in every other act or law in which it may be found. In other words, we dispute and deny the requirement of free mail service as such and not on its merits as a part or parcel of Act 2657.

If such a requirement is invalid, as respondents contend, and as the Supreme Court of the Philippine Islands has held, it matters not what law or decree may purport to justify it. All such laws or decrees are *pro tanto,* invalid and inoperative.

The constitutional limitations of the present Philippine Organic Law are not applicable to the legislation promulgated since July 1, 1902, alone, but they are limitations upon the entire powers of government regardless of the warrant relied upon. No act of the Government in violation of these limitations can be justified upon the Spanish laws or decrees promulgated prior to the constitution.

We do not consider it necessary at this time, upon petition for certiorari, to discuss the established doctrines of constitutional law which in the opinion of the Supreme Court of the Philippine Islands nullified this attempt of the Philippine Legislature to compel respondents to carry the mails without compensation. Those doctrines are so familiar, and are set forth in so many classic opinions of this court, that the majority members of the Supreme Court of the Philippine Islands did not even write an opinion in the present case setting forth a discussion of the law, but apparently considered that a mere statement of the case was sufficient for its decision.

We seek in this brief chiefly to confine petitioner to the issue raised. The Act in question, without equivocation, in express terms requires the free carriage of the mails, and the proceeding before the Board of Public Utility Commissioners, petitioner here, was expressly instituted by the Director of Posts to compel a compliance with the requirement of that Act. The sole issue in this case therefore, or that could have been an issue, is the constitutionality and

validity of section 309 of the Administrative Code which attempted to compel the respondents to carry the mails free.

Justice Carson's dissenting opinion and petitioner's brief in support of petition for certiorari, are based very largely upon matters not in the record, and upon preconceived ideas as to the relative justice of the matter and the respondents' ability to bear this burden. The record is brief, and presents clearly the issue stripped of all possible misunderstanding. The decision of the majority members of the Supreme Court of the Philippine Islands epitomizes the entire case, and we quote same here in full:

> "The only question presented by these proceedings is, whether the petitioners, who are operating vessels, engaged in the coastwise trade, plying between Philippine ports, may be required to carry mail free of charge in accordance with the provisions of section 309 of the Administrative Code (Act No. 2657; Section 568, Act No. 2711).
>
> "On the 1st day of June, 1916, the Board of Public Utility Commissioners ordered the said petitioners to receive and carry mails free of charge. The question of the legality of said order was brought to this court for review.
>
> "We have made a careful examination of the facts and the law upon which said order was based and have reached the conclusion that the same and the law upon which it is based is in direct contravention of the provisions of the Organic Law of the Philippines, which prohibits the taking of private property for public use *without just compensation*.
>
> "For the reason, therefore, and without prejudice to the writing of an opinion in which the facts and the law shall be more fully discussed, that, by virtue of said order the private property of said petitioners is taken for public use without due compensation, contrary to the provisions of the Organic Law of the Philippines, it is hereby decreed and ordered that a judgment be entered nullifying and setting aside the same."

Respondents submit that the act of the Philippine Legislature in question is plainly invalid and in direct contravention of the Constitution of the United States and the Act of Congress of July 1, 1902, known as the Philippine Organic Act, in that it attempted to deprive respondents of their property without due process of law and of the equal protection of the law, and to take the private property of respondents for a public use without just compensation; that the decision of the Supreme Court of the Philippine Islands was correct, and that this petition for certiorari should be denied.

Respectfully submitted,

ALEX. BRITTON,
EVANS BROWNE,
Counsel for Respondents.

INDEX.

AUTHORITIES CITED.

CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE BOARD OF PUBLIC UTILITY COMMISSIONERS, *Petitioner*,

v.

YNCHAUSTI & Co., et al, *Respondents.*

No. 190

On Writ of Certiorari to the Supreme Court of the Philippine Islands.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

This case is here on writ of certiorari issued to the Supreme Court of the Philippine Islands for the review of the judgment of that court holding illegal and setting aside a decision of the Board of Public Utility Commissioners of those Islands. (R. 78.)

Petitioner, Board of Public Utility Commissioners, is an administrative Board, established pursuant to the provisions of Act No. 2307, as amended, of the Philippine Legislature. Respondents, Ynchausti & Co., Compañía General de Tobacos de Filipinas, J. M. Poizat & Co., and Fernández Hermanos, are marine carriers engaged in the coastwise trade of the Philippine Islands. (R. 2.)

The law requires vessels engaged in the Philippine coastwise trade to carry mail without charge, and to be duly licensed annually. (Appendix, p. 43.) During the Spanish régime, and after the change of sovereignty, the respondents and other marine carriers operating vessels between Philippine ports carried mail without direct payment therefor. (R. 70.) No prior claim has been made that the Philippine Organic Act rendered this practice illegal.

On May 4, 1916, the respondents served notice on the Director of Posts of the Philippine Islands that beginning June 1, 1916, they would decline to carry mail on their vessels plying between Philippine ports under the terms and conditions imposed by law. The Director of Posts referred said notice to the Board of Public Utility Commissioners, which body was charged with the duty of seeing that public utilities complied with the laws of the Philippine Islands, with the request that an order be issued directed to said respondents commanding them to comply with the laws governing said service. (R. 5.)

On June 1, 1916, said Board, after citing the parties and due hearing of the matter, entered its decision and order requiring the respondents to continue to carry the mails in accordance with the law and terms of the license whereby they were authorized to engage in the coastwise trade of the Philippine Islands. (R. 40.)

Thereafter the respondents petitioned the Supreme Court of the Philippine Islands to review said order, and on January 23, 1918, said court entered its judgment revoking and setting aside the order of this petitioner on the ground that "the law upon which it is based is in direct contravention of the provisions of the Organic Law of the Philippines, which prohibits the taking of private property for public use without just compensation." (R. 48.) Although the court reserved the right of "writing an opinion in which the facts and the law shall be more fully discussed," no additional opinion has been filed, and, under the practice of the court, it is believed none will be.

The present controversy arises from opposing conceptions of the effect of the Philippine Organic Act on existing legislation relating to the Philippine coastwise trade. There is no dispute about the salient facts. The sole question propounded by the case is whether the Organic Law renders invalid that part of section 568 of Act No. 2711 (the Administrative Code) of the Philippine Legislature, providing that "vessels engaged in the coastwise trade and vessels plying between Philippine ports shall continue to carry mail free" (a mere codification of the antecedent law), so far as same is applicable to or affects these respondents.

ASSIGNMENT OF ERRORS.

I.

The court erred in holding that the order of the Board of Public Utility Commissioners deprives the respondent marine carriers of any right or privilege accorded them by the Philippine Organic Act.

II.

The court erred in setting aside the decision and order of the Board of Public Utility Commissioners commanding the respondents to comply with their obligation to carry the mail.

ARGUMENT.

The order of the Board of Public Utility Commissioners directed the respondents "to instruct the masters and agents of their vessels plying between Philippine ports to continue to receive and carry the said mails on and after the aforesaid June 1, as they have done heretofore." (R. 44.) Petitioner's basic proposition in support of the correctness of said order may be stated as follows:

THE RESPONDENTS HAVING APPLIED FOR AND ACCEPTED LICENSES AUTHORIZING THEM TO OPERATE VESSELS IN THE PHILIPPINE COASTWISE TRADE SUBJECT TO THE LAW REQUIRING THEM TO CARRY MAIL WITHOUT CHARGE IN CONSIDERATION OF PRIVILEGES AND BENEFITS ACCORDED THEM BY THE GOVERNMENT IN GRANTING THEM THE RIGHT TO ENGAGE IN SAID BUSINESS HAVE NO CAUSE FOR COMPLAINT REGARDING THE CONDITIONS PRESCRIBED AND OBLIGATIONS VOLUNTARILY ASSUMED.

In the case of Internat'l & G. N. Ry. Co. *v.* Anderson Co., 246 U. S. 424, 433, the court said:

> But furthermore when the Office-Shops Act was on the statute book the plaintiff in error took out a charter under general laws that expressly subjected it to the limitations imposed by law. It is stated that this does not make the plaintiff in error adopt an otherwise unconstitutional statute. But even if, contrary to what we have intimated, the act could not otherwise have affected those particular corporations, it was a law upon the statute books and was far from a mere nullity, and if it was made a condition of incorporation that this restriction should be accepted, the plaintiff in error cannot complain. *Interstate Consolidated Street Ry. Co. v. Massachusetts*, 207 U. S. 79;

And in Kansas City, etc., R. R. Co. *v.* Stiles, 242 U. S. 111, 117:

> The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they can not be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the State of Alabama.

In the Interstate Railway Co. case (207 U. S. 79) this court affirmed the judgment of the Supreme Court of Massachusetts (Commonwealth *v.* Interstate Consolidated St. Ry. Co., 187 Mass. 436, 73

N. E. 530) sustaining the validity of a statute requiring street railway companies to carry pupils of the public schools at rates not exceeding one-half the regular fare. Said decision was predicated on the ground that the statute in question was in force when the company took its charter.

The carriage of the mails was made obligatory upon the railroads chartered under the so-called "Land grant acts." The other lines were free agents in contracting with the Government for this service, and might accept or refuse to transport mail at their pleasure (Eastern Railroad Co., *v.* United States, 129 U. S. 391); but those aided by land grants were not at liberty to decline to carry the mails if dissatisfied with the terms prescribed by Congress or the Postmaster General. United States *v.* Alabama Railroad Co., 142 U. S. 615; Chicago, St. P., etc., Ry. *v.* United States, 217 U. S. 180. These companies have been allowed some compensation for carrying mail—merely carrying at a reduced rate—but there is no difference in principle between free and reduced-rate service, and they could be required to carry mail free under the provisions of the incorporating acts.

Wyman on Public Service Corporations, Vol. 2, p. 1151, says: "It is, moreover, well established that in granting any legal privileges to a public service company, if the franchise conferred be no more than

incorporation itself, the granting government, of whatever grade it may be, may stipulate for free service for its own public purposes." In the absence of a constitutional inhibition, very clearly the Government of the Philippine Islands may grant franchises and licenses to public utilities subject to the condition that it be given free service for a public purpose in return for privileges conferred upon the licensee.

The law in force in the Philippines at the time of the change of sovereignty from Spain to the United States required all vessels engaged in the interisland trade to carry the mail without direct compensation. This practice was continued by the present Government, and no question was raised regarding its legality until these respondents refused to continue to carry the mail, claiming that the law requiring such service was unconstitutional.

The familiar constitutional provisions respecting property contained in the Fifth and Fourteenth Amendments to the United States Constitution were incorporated in the Philippine Organic Act. (Acts of Congress of July 1, 1902; and August 29, 1916.) The provisions of the Organic Law relating to the protection of property rights are as follows:

> That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken

for public use without just compensation; * * *

(Instructions of the President to the Philippine Commission, April 7, 1900.)

That no law shall be enacted in said Islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

(Sec. 5, Act of Congress of July 1, 1902, 32 Stat. 695.)

That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws. Private property shall not be taken for public use without just compensation.

(Sec. 3, Act of Congress of August 29, 1916, 39 Stat. 545.)

These constitutional requirements and inhibitions must, of course, receive the same construction and application in the Philippines as in continental United States. Weems *v.* United States, 217 U. S. 349, 367.

The governmental practice whereby vessels engaged in the Philippine coastwise trade carried mail free in return for privileges extended had long been in operation at the time of the enactment of the Philippine Organic Act. In addition to the legislative declaration that "the laws now in force in the

Philippines shall continue in force and effect, except as altered, amended or modified herein" (Section 6, Organic Act; 39 Stat. 545) we have the established rule that a change of sovereignty does not affect existing municipal law. Vilas *v.* Manila, 220 U. S. 345. In his instructions to the Philippine Commission (April 7, 1900) the President said: "The main body of the laws which regulate the rights and obligations of the people should be maintained with as little interference as possible."

In the recent case of Compañiá General de Tobacos *v.* Alhambra C. & C. Mfg. Co., 249 U. S. 72, 75–76, this court said:

> By the Treaty of Paris of 1898, Spain ceded to the United States the archipelago known as the Philippine Islands. In Article VIII of the treaty it is provided that the relinquishment or cession, as the case may be, "cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatever nationality such individuals may be." * * *
>
> It is the evident purpose of these provisions, in view of the cession of territory made by

> Spain to the United States, to preserve private rights of property, and to provide that the change of sovereignty should work no impairment of such rights.

The preservation of the public interests secured by or involved in existing legislation was intended quite as much as the maintenance of the rights of private persons.

If the present city of Manila is in every legal sense the successor of the old and as such entitled to the property and rights of the predecessor corporation (Vilas *v.* Manila, 220 U. S. 345, 361), the same is certainly true of the central government of the Philippine Islands. (Government of the P. I. *v.* Monte de Piedad, 35 Phil. Rep. 728.) A right of any validity before the cession is equally valid afterwards. Ely's Administrator *v.* United States, 171 U. S. 220, 223.

Under Spanish law the seashore is the property of the State. (See, Ker *v.* Couden, 223 U. S. 268, 277.) The Law of Waters of August 3, 1866, in force in the Philippine Islands, declares the following to be a part of the public domain:

> The coast sea, that is, the maritime zone, encircling the coasts, in all the breadth laid down by international law. The State provides for and regulates the police and uses of this zone, as well as the right of refuge and immunity therein, according to international law and treaty. (Article I, par. 2.)

The same legal doctrine obtains in this country. "By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects." Shively *v.* Bowlby, 152 U. S. 1, 11.

Upon the cession of the Philippine Islands this public property vested in the United States. And by section 12 of the Act of Congress of July 1, 1902 (section 9 of the Act of August 29, 1916), it was placed under the control of the Government of the Philippine Islands. Section 11 of the Act of July 1, 1902, provides:

> That the Government of the Philippine Islands is hereby authorized to provide for the needs of commerce by improving the harbors and navigable waters of said Islands and to construct and maintain in said navigable waters and upon the shore adjacent thereto bonded warehouses, wharves, piers, light-houses, signal and life-saving stations,

> buoys, and like instruments of commerce, and to adopt and enforce regulations in regard thereto, * * *

The body of maritime law in force in the Philippines under Spain (Code of Commerce, book third) is still in force. The Philippine courts possess admiralty jurisdiction. The coastwise trade is a rightful subject of local legislation, and the Philippine Legislature has always exercised control over this subject-matter. In order that there might be no doubt regarding its intention to leave the coastwise trade exclusively in the hands of the Philippine government, Congress, in the Act approved April 15, 1904, 33 Stat. 181 (an act to regulate shipping between ports of the United States and ports of the Philippine Islands) inserted the following provision:

> That sections one and two of this Act shall not apply to the transportation of merchandise or passengers between ports or places in the Philippine Archipelago. Until Congress shall have authorized the registry as vessels of the United States of vessels owned in the Philippine Archipelago the Government of the Philippine Islands is hereby authorized to adopt, from time to time, and enforce regulations governing the transportation of merchandise and passengers between ports or places in the Philippine Archipelago. (Section 3.)

In his official report to the Postmaster General of the United States in the year 1899 our first Director of Posts in the Philippines (under the government instituted by the President) called attention to "the old Spanish law under which all steamships engaged in interinsular trade are required to carry the mail without compensation," and announced his intention to enforce it (R. 70). Congress subsequently approved and ratified the action of the President in establishing a civil government in the Islands (Acts of March 2, 1901, and July 1, 1902), and must have had its attention drawn to the laws in force there. And as the provision here in question had been enforced by our government for some years prior to the enactment of the Philippine Bill, it seems clear that Congress would have annulled or repealed the same had it been considered opposed to American legal principles or otherwise inexpedient. At that time apparently no one, not even these respondents, supposed it to infringe constitutional rights.

The Government of the Philippine Islands possesses like plenary power over its coastwise trade as does Congress over the coastwise trade of the United States—that is, complete control over this commerce. It may open and close ports to vessels at will; and may entirely exclude them from the privilege of carrying on this trade. In Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, it was held that:

> The power to regulate commerce, interstate and foreign, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. (Syllabus.)

Since the government may grant or withhold permission to engage in the coastwise trade, it follows, as a necessary consequence, that it may attach conditions to the exercise of this privilege. The greater power includes the less. In The William Bagaley, 5 Wall. 377, 409, this court said: "Commercial nations generally have, for the advancement of their own individual prosperity, conferred great privileges upon the ships belonging to their own citizens, and, in consideration thereof, have imposed upon their owners certain special duties and obligations."

As no limitation has been imposed upon it in the premises, the Philippine Legislature has the same power as Congress over the Philippine coastwise trade. The constitutional inhibitions regarding the deprivation of property rights apply equally to both lawmaking bodies. Alaska Pacific Fisheries *v.* Territory of Alaska, 236 Fed. 52, 59; Ochoa *v.* Hernandez, 230 U. S. 139. With reference to the exercise of another governmental power (the deportation of aliens) this court in Tiaco *v.* Forbes, 228 U. S. 549, held that as Congress is not prevented by the Con-

stitution the Philippine Government cannot be prevented by the Bill of Rights incorporated in the act of July 1, 1902. In enacting laws for the Philippines, Congress, and the Philippine Legislature to which it has delegated general legislative power, is limited only by the provisions of the fundamental law; they have all the powers both of national and of municipal government, since there can be no conflict with the reserved power of the States. Shively *v.* Bowlby, 152 U. S. 1; Wilson *v.* Shaw, 204 U. S. 24, 35.

The action of each and all of the coordinate departments of our Government in dealing with the Philippine Islands clearly shows that it was not the intention to deprive the government of the latter of authority formerly exercised over its coastwise trade or of the usual powers possessed by the Federal, State and Territorial Governments respecting the granting of licenses to public service corporations. In the words of the syllabus in Perez *v.* Fernandez, 202 U. S. 80: "The policy of the United States, evidenced in its legislation concerning the islands ceded by Spain, has been to secure to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law, * * *." The Organic Act specifically authorizes the Government of the Philippine Islands to grant franchises, privileges and rights to engage in business in said

Islands. (Section 74, Act of July 1, 1902, 32 Stat. 695; section 28, Act of August 29, 1916, 39 Stat. 545.)

If the provisions of the Philippine Organic Act cited by respondents be construed as have identical or similar provisions in the Federal and State Constitutions, the Government of the Philippine Islands is empowered to stipulate for free carriage of mail in granting marine carriers the privilege of engaging in the coastwise trade. The carriage of the mails is a government monopoly in which no element of competition can enter; it is a function assumed and controlled by the State. There is no analogy between the transportation of mail and that of freight or passengers. The basis for the distinction made is obvious and fully justified. It has been held that a transportation company is not a common carrier in respect to such service when carrying mail—either as a duty imposed by a statute or under a contract with the Government. (Bankers' Mutual Casualty Co. *v.* Minneapolis, St. P. & S. S. M. Ry. Co., 117 Fed. 434; United States *v.* Hamburg-Amerikan, etc., Gesellschaft, 212 Fed. 40, 43.) As was said in Atchison, T. & S. F. Ry. Co. *v.* United States (225 U. S. 640, 649):

> For, public policy requires that the mail should be carried subject to postal regulations, and that the Department and not the railroad should, in the absence of a contract, de-

> termine what service was needed and under what conditions it should be performed. The company in carrying the mails was not hauling freight, not was it acting as a common carrier, with corresponding rights and liabilities but in this respect it was serving as an agency of government, and as much subject to the laws and regulations as every other branch of the Post-Office.

Every resident of the Philippine Islands is a patron and beneficiary of the postal service. And this service requirement being imposed alike upon all vessels documented in the coastwise trade, there is no discrimination or lack of uniformity in its operation. The Government maintains the postal service for the benefit of all the people; and the laws relating to marine carriers are equal and uniform upon all persons engaging in the business of common carrier in Philippine waters, both in the privileges conferred and in the duties imposed.

The Government of the Philippine Islands is clearly empowered to impose such conditions precedent as it deems best for the enjoyment of the privilege of engaging in the *quasi* public business of marine carrier in Philippine waters. No one has the right to engage in the coastwise trade except upon compliance with the conditions prescribed by the Government. The respondents and the owner of every vessel documented in the Philippine coastwise trade

voluntarily obligated themselves to carry mail without charge as a condition of their original entry upon the business of common carrier in that jurisdiction. The registration of a vessel for the coastwise trade and the annual renewal of her license therefor is only made upon application of the owner; and the continuance of her operation in those waters is entirely optional with the owner. He is under no obligation to keep her in the Philippine coastwise trade.

It will be noted that this is not a case where a new burden or added restriction has been imposed upon an existing business. The Government has not changed the conditions under which the respondents and others engaged in the Philippine coastwise trade entered upon and have conducted their business. In the cases cited by respondents in the court below the challenged statute placed new burdens upon the business affected. The essential difference between such cases and this one is manifest. No vested right or legitimate interest is impaired by the practice here in question. Vessels plying between Philippine ports never possessed any property right to collect toll for carrying mail, as no payment has ever been made or authorized for this service.

Every political entity endowed with general governmental powers possesses authority to regulate the transaction of local business within its borders. The

source of this authority is said to be the police power, which inheres in governments of all grades. Gundling *v.* Chicago, 177 U. S. 183, 188. In the language of the Supreme Court of Illinois, . . . "no one, we presume, will question the legislative power to require persons engaged in the various avocations to procure a license for the purpose, and thus regulate the exercise of an avocation. It is a power exercised by all governments, * * *". (Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560, 567.) This court, in the License Tax Cases, 5 Wall. 462, 470, 18 L. ed. 497, 500, said:

> It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms.
>
> Thus, Congress having power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other licenses necessary or proper for the exercise of that great and extensive power; and the same observation is applicable to every other power of Congress, to the exercise of which the granting of licenses may be incident. All

such licenses confer authority, and give rights to the licensee.

A license or franchise which authorizes its recipient to engage in a given business is in the nature of a special privilege, not a right common to all. Referring to a coastwise license, Mr. Chief Justice Marshall in Gibbons *v.* Ogden, 9 Wheat. 1, 214, said: "The license must be understood to be what it purports to be, a legislative authority to the steamboat Bellona 'to be employed in carrying on the coasting trade, for one year from this date.'" The granting of the rights and privileges, which constitute the license or franchise, to pursue a business being a matter resting entirely within the control of the legislature, it may be accompanied with such conditions as the legislature deems most suitable to the public interests and policy. This is especially true of the business of common carrier, which from the earliest times has been recognized as distinctive in character and specially subject to legislative control. It is a business claiming special privileges at the hands of the community and is impressed with a public interest.

A legitimate distinction exists between the granting of free service to the State and to private individuals.

While all our public service commission laws prohibit the granting of free service or discriminatory rates to private parties, they usually except the

United States, state and municipal governments. The requirement of free service and service at reduced rates of public service corporations in return for privileges and benefits granted by the public can be said to be quite common. This practice is not opposed to the common law, nor to American constitutional law or public policy. Sutton *v.* State, 244 U. S. 258, 61 L. ed. 1117; Willcox *v.* Consolidated Gas Co., 212 U. S. 19, 53 L. ed. 392; Interstate Commerce Comm. *v.* Baltimore & O. R. Co., 145 U. S. 263, 36 L. ed. 699; National Water-Works Co. *v.* School District No. 7, 48 Fed. Rep. 523; New York Telephone Co. *v.* Siegel-Cooper Co., 202 N. Y. 502, 96 N. E. 109; City of Belfast *v.* Belfast Water Co. 115 Me. 234, 98 Atl. 738; Superior *v.* Douglas County Telephone Co. 141 Wis. 363, 122 N. W. 1023; Boise City *v.* Artesian Hot & Cold Water Co., 4 Idaho 351, 39 Pac. 562.

The right to engage in the coastwise trade is limited to vessels carrying a certificate of Philippine register. Some of the privileges conferred by Philippine register are set forth in section 1175 of the Administrative Code (Appendix p. 43). Said section provides that—

> *Privileges conferred by certificate of Philippine register.* A certificate of Philippine register confers upon the vessel the right to engage, consistently with law, in the Philippine coastwise

> trade and entitles it to the protection of the authorities and flag of the United States in all ports and on the high seas, and at the same time secures to it the same privileges and subjects it to the same disabilities as under the laws of the United States pertain to foreign-built vessels transferred abroad to citizens of the United States.

Every vessel employed in navigation must have a register and the protection of a flag. As stated in White's Bank *v.* Smith, 7 Wall, 646, 655–656:

> Ships or vessels of the United States are the creations of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the act of September 1, 1789; * * *
>
> Ships or vessels not brought within these provisions of the acts of Congress, and not entitled to the benefits and privileges thereunto belonging, are of no more value as American vessels than the wood and iron out of which they are constructed. Their substantial if not entire value consists in their right to the character of national vessels, and to have the protection of the national flag floating at their mast's head.

The right to engage in the coastwise trade is everywhere treated as a valuable privilege. As observed by Mr. Justice Johnson in his concurring opinion in Gibbons *v.* Ogden, 9 Wheat. 1, 232: "Almost every

commercial nation reserves to its own subjects a monopoly of its coasting trade; and a countervailing privilege in favor of American shipping is contemplated in the whole legislation of the United States on this subject. It is not to give the vessel an American character, that the license is granted; that effect has been correctly attributed to the act of her enrollment. But it is to confer on her American privileges, as contradistinguished from foreign; and to preserve the government from fraud by foreigners, in surreptitiously intruding themselves into the American commercial marine, as well as frauds upon the revenue, in the trade coastwise, that this whole system is projected."

Long-continued legislative usage is of controlling weight upon the constitutionality of an act.

As observed by this court in Rhode Island *v.* Massachusetts, 4 How. 591, 638: "No human transactions are unaffected by time." In the case of United States *v.* Midwest Oil Co., 236 U. S. 459, 472–473, the court said:

> It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been

> allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the constitutionality of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

And in Downes *v.* Bidwell, 182 U. S. 244, it was held that:

> A long-continued and uniform interpretation, put by the executive and legislative departments of the government, upon a clause in the Constitution should be followed by the judicial department, unless such interpretation be manifestly contrary to its letter and spirit. (Syllabus.)

In their brief in opposition to petition for certiorari (page 2) respondents say: "After the change of sovereignty from Spain to the United States, and until June 1, 1916, respondents carried the mails free, continuing for that period of time the former practice under the Spanish regime." The respondents thus acquiesced in carrying the mail for eighteen years after the beginning of American sovereignty and in the interpretation given the Philippine Organic Act by the executive and legislative Departments of the Government. In Great Northern Ry. Co. *v.* United States, 236 Fed. 433, the Circuit Court of Appeals held that (syllabus): "Where for a long time a railroad com-

pany acquiesced in postal regulations applicable to contracts and statutes relating to the carrying of the mails, such acquiescence will not be disregarded without the most persuasive reasons."

Whether the practice in question accords with the policy of some other jurisdictions, or is wise or expedient, is not here a matter of concern. As held in Ling Su Fan *v.* United States, 218 U. S. 302:

> In determining whether a law of the Philippine Commission is invalid as inconsistent with the Organic Act this court puts aside all questions of the wisdom of the law, even if enacted in the face of axioms of commerce, and considers only whether power exists to enact under, and whether the enactment is inconsistent with, the Organic Act. (Syllabus.)

Referring to another matter in which the American and Philippine methods differed, this court in the case of Ibanez *v.* Hongkong Banking Corp., 246 U. S. 621, 626–627, observed:

> The value and extent of both rights this court has had occasion to declare in Darlington *v.* Turner (202 U. S. 195, 230, et seq.) and in view of that case we are forced to think that, however our habits may induce us to approve the American system of the relation of parent and child and that there should be interposed between them when property interests are involved the order of a court and the security of bonds, there are other people—including a State of this Union—who have

> found that they could rely with confidence on other than material considerations for the performance of duty and that "filiation" could stand in lieu of "those legal safeguards" with which the new code of procedure "envelops the property of a minor child."

The legislative branch determines what is expedient for the community concerned. In view of the peculiar conditions surrounding interisland shipping, the Philippine Legislature has so far declined to change the practice inaugurated many decades ago, and to which the business has adapted itself, of requiring coastwise vessels to carry mail without charge between ports of call.

The customs and usages of a community are proper factors for consideration in determining the constitutionality of legislation. As stated in Interstate Railway Co. *v.* Massachusetts, 207 U. S. 79, 87: "Structural habits count for as much as logic in drawing the line." And in State *v.* Sutton, 83 N. J. L., 46, 49, 84 Atl. 1057, 1059 (affirmed by this court in Sutton *v.* State, 244 U. S. 258): "The constitutionality of legislation is not always to be tested by abstract reasoning. It depends, in part at least, upon the habits and customs of a community." The annulment of the law here involved with the resultant enforced change of the long-continued statutory practice should not be accomplished without compelling reasons therefor.

There is nothing novel or extraordinary in fundamental principle about this service requirement of these public service companies. It is not essentially different from the requirement that public utilities furnish governmental entities water, light, transportation, etc., free; or that citizens labor without compensation in building and maintaining roads or render compulsory service to the State in any other capacity.

All persons licensed to practice law in the Philippine Islands are obliged to serve destitute litigants free upon request of a court. Section 35 of Act No. 190 of the Philippine Commission (Volume 1, Public Laws of the Philippine Commission, p. 383) provides that—

> *Lawyers for destitute litigants.*—The Supreme Court and Courts of the First Instance may, in their discretion, assign any lawyer to render professional aid to a party, in any pending action, free of charge, if such court, upon full investigation, shall find that the party is destitute and unable to employ a lawyer and that the services of counsel are necessary to secure the ends of justice and to protect the rights of the party. Upon such assignment, it shall be the duty of the lawyer assigned to render the required services, unless he shall be excused therefrom by the court for sufficient cause shown.

No attorney in the Philippines has attacked this

law as taking his time and labor, his property, without compensation. In House *v.* Whitis, 5 Baxt. (64 Tenn.) 690, the Supreme Court of Tennessee held that the courts of that State could command the services of counsel for persons unable to pay in civil as well as in criminal cases. And in the opinion said: "Where a lawyer takes his license he takes it burthened with these honorary obligations." "The principle of the organic law which forbids the demand of any man's particular services without just compensation has no application to such a case." Id. 692.

An obligation voluntarily assumed by those seeking the right to engage in the coastwise trade, or the acceptance of the privilege of pursuing any other business or occupation with public burdens attached, can not constitute a "taking" of property within the constitutional sense. In his concurring opinion in Pullman Co. *v.* Kansas, 216 U. S. 56, 66–67, Mr. Justice White (now Chief Justice) observed, citing many authorities, that under such circumstances one is not in position to assail the constitutionality of the condition because by accepting the privilege he has voluntarily consented to be bound by the condition.

The following language of this court in Hamilton *v.* Dillin, 21 Wall. 73, 91, relative to the voluntary acceptance of a license to engage in trade under the conditions imposed by the Government, is equally

apposite to the case of these steamship companies who applied for permission to engage in the Philippine coastwise trade: "No one was bound to accept it. No one was compelled to engage in the trade." "The position in which the plaintiffs put themselves, therefore, was an entirely voluntary one. They have no right now to say: 'It is true we purchased the cotton under a license which required us to pay a certain bonus; but having purchased it, we were entitled to repudiate the condition, although we had no right to make the purchase except by virtue of the license.'"

In the case of United States *v.* Pompeya, 31 Philippine Reports 245, the Supreme Court of the Philippine Islands held that a local statute (Act No. 1309 of the Philippine Commission) requiring able-bodied male residents between the ages of 18 and 50 years to serve without remuneration for a period not exceeding five days each month in apprehending lawbreakers did not contravene the Philippine Organic Act. The transportation of the mail between ports of call by vessels engaged in the Philippine coastwise trade is an exceedingly light burden compared with some others imposed upon citizens and public service corporations.

As mentioned on page 17 of the record, Philippine railroads receive direct compensation for carrying mail. The charters granted these companies by the Philippine Legislature provide for this. They

are required to furnish better facilities for handling mail than interisland vessels, and by operating trains on schedule through fixed territory add greatly to the convenience and value of this service. As pointed out in the report of the Director of Posts for the year 1901 (R. 70), Philippine steamship companies operate their vessels according to the demands of their private business, and are not required to maintain regular sailing schedules. The law merely requires vessels to carry mail, if any is offered, *when they go* from one Philippine port to another.

There is no similarity in situation and condition between marine carriers and railroads. As Mr. Justice Brewer said in Ames *v.* Union Pacific Ry. Co., 64 Fed. 165, 177: "It must always be borne in mind that property put into railroad transportation is put there permanently. It can not be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit in one place, and under one prescribed rate of transportation, can be taken elsewhere, and put to use at other places, and under other circumstances." The legislation affecting Philippine railroads and marine carriers is entirely separate and distinct. Franchise privileges, taxation, rates, etc., are different. The business of navigation is *sui generis*, and in every country is governed by laws and customs of its own. Vessels engaged in the Philippine coastwise

trade utilize the artificial facilities and aids to navigation which have been constructed at large cost to the Government. Compensation is frequently exacted for the use of such improvements. Sands *v.* Manistee River Imp. Co., 123 U. S. 288.

Prior to the passage of the act of Congress of June 26, 1884 (23 Stat. 58) vessels of American register were obliged to carry the mails to and from the United States. In Pacific Mail Steamship Co. *v.* United States, 28 Ct. Cls. 1, 19, the court said:

> The Postmaster-General had the whole matter absolutely under his control; during the period now under consideration United States steamships were by law forced to take the United States mails whether they wished to do so or not (sec. 3976 and sec. 4203 R. S., repealed June 26, 1884, ch. 121, Vol. 23, Stat. L.); and moreover, to take them at such a rate as the Postmaster-General chose to allow (subject to maximum limitation only); * * *.

Until the act of July 28, 1916 (39 Stat. 425), railroads in the United States, with the exception of those aided by the Government, were not compelled to carry mail. Under this law all railroads are required to transport mail in the manner prescribed by the Postmaster-General and at the rate fixed by the Interstate Commerce Commission.

Although the acceptance of a license to engage, consistently with law, in the coastwise trade (and its annual renewal) would appear to dispose of every

possible constitutional objection the licensee could raise against complying with the obligations thereby assumed, whatever the effect upon his financial fortunes, it will be seen that *these respondents have failed to show that the law complained of has made their business unprofitable or has operated to deprive them of any right whatever.* "He who would successfully assail a law as unconstitutional must come showing that the feature of the act complained of operates to deprive him of some constitutional right" (Aikens *v.* Kingsbury, 247 U. S. 484, 489), and "must bring himself within the class affected by the unconstitutional feature" (Arkadelphia Mill. Co. *v.* St. Louis Southwestern R. Co. 249 U. S. 134, 149).

The record discloses that these marine carriers gave very little attention to data regarding the service referred to. Whether this was due to its inconsequential character, or to its being regarded in a fatalistic light, is left to conjecture. There is no showing that the burden or inconvenience resulting from the requirement of carrying the mail is greater than in previous years, and certainly none that it is now a matter of serious concern to vessel owners operating craft between ports of the Philippine Islands. The following observations of Mr. Justice Carson (R. 60–62) on the evidence adduced by the interested shipping firms are fully supported by the record:

Aside from all this, I am satisfied that an examination of the record discloses that the petitioners have failed utterly to establish their contentions in this regard; and, indeed, I am convinced that with the aid of the public records, and having in mind matters of common knowledge of which the courts may take judicial notice, we would be justified in holding affirmatively that the requirement is neither unreasonable nor unjust, nor oppressive, nor confiscatory in any other sense than that in which the recovery of license fees, tolls, tonnage dues, occupation taxes, and the like can be said to be confiscatory.

Among the petitioners are included several of the largest and oldest fleets of vessels engaged in the interisland trade. Some of the officers of these shipping corporations, long in their service, were called as witnesses before the Board of Public Utility Commissioners, in support of petitioners' contentions as to the alleged oppressive and confiscatory effect of the requirement of the free carriage of the mails by their vessels. None of these officers was able to recall a single instance in the history of the coastwise trade in which any of their vessels was compelled to reject general cargo because of lack of space occasioned by the free carriage of mail. Asked by their counsel if the amount of mail carried by any of their vessels ever exceeded 100 bags, the witnesses were able to remember but a few

instances of that kind, and emphasis being laid upon one occasion when approximately 200 bags were carried from Manila to Iloilo on one of the large steamers plying between those ports; although it developed on cross-examination that, on that occasion, the vessel was operated under one of the so-called subvention contracts in existence some years ago, under which a few of the larger and speedier vessels received an allowance from the Government, conditioned upon the maintenance of a regular sailing schedule and specified standards of public service, required only of vessels sailing under a Government subsidy.

Much was made of the fact that the carriage of the mails necessarily involves the expenditure of time and labor in stowing and handling it aboard the vessels on which it is transported; and the record discloses that on occasions small sums have been paid to messengers to carry the mail from ship side to the post-office in some of the smaller towns. It does not appear, however, that the burden of handling and stowing the mails aboard any of these vessels has necessitated an increase of the crews, or subjected the shipowner to any substantial loss or expense; and it affirmatively appears that acceptance and delivery of the mails at the wharves or local landing places at all ports of call is all that has ever been required of them under the statutory requirement for the free carriage of the mails.

No other evidence was introduced by the petitioners in support of their contentions that the requirement of the free carriage of the mails is unreasonable, oppressive, and confiscatory, save only certain vague and indefinite statements as to the alleged inconvenience and trouble to which they are put by compliance with shipping regulations, requiring all shipmasters to give reasonable notice of their sailing hours to the post offices at the various ports at which they touch, and imposing other obligations of a like nature on vessels engaged in the coastwise carrying trade. But these regulations impose no special or prescribed schedule on vessels engaged in the coastwise trade; and the statutory requirement for the free carriage of the mails does not impose upon these vessels any obligation to comply with unreasonable, oppressive, or confiscatory regulations—if any there be—it matters not by what authority they may be promulgated.

It is not denied that an appreciable burden is assumed by all coastwise trading vessels when they obligate themselves to carry the mails free; but there is nothing in the record which would justify a finding that the requirement of the free carriage of the mails imposed as a condition precedent to the grant of a license to engage in the coastwise carrying trade is unreasonable, oppressive, or confiscatory.

> The burden of the free carriage of the mails, distributed as it is among the numerous vessels engaged in the coastwise trade, so that seldom does any such vessel, except the largest, take aboard more than a few sacks of mail (rarely as much as 100 sacks on the largest vessels), and so that no such vessel has ever found it necessary to reject cargo for lack of the space occupied by the mails, would not seem to me unreasonable, oppressive, or confiscatory, even if no large expenditure of public funds were made to enhance the value of the privileges enjoyed by these vessels when licensed to engage in the coastwise carrying trade.

The test for determining whether legislation is confiscatory is its effect upon the entire revenues of the utility concerned. It is not enough to show that no profit may come from a particular service. New York & Queens Gas Co. *v.* McCall, 245 U. S. 345; Puget Sound Traction Co. *v.* Reynolds, 244 U. S. 574; Willcox *v.* Consolidated Gas Co., 212 U. S. 19; Commonwealth *v.* Boston & N St. Ry. Co., 212 Mass. 82, 98 N. E. 1075.

As this case presents a law in actual operation, one that has been enforced for many decades, we are not obliged to reason from the probable to the actual or to speculate about its effect in practical application. Philippine coastwise tonnage has increased and shipping firms have enjoyed considerable prosperity during this time. During the past year (1918) 42

steam vessels and 300 sailing vessels were newly documented in the Philippine coastwise trade. (Annual Report of the Insular Collector of Customs for year ended December 31, 1918, page 25.) At the hearing of case No. 809 before the Board of Public Utility Commissioners the manager of Ynchausti & Co. testified that said firm realized a profit of 30 per cent annually from the operation of one of its vessels engaged in the coastwise trade (14 Official Gazette, 2072, 2073). Presumably, these marine carriers in fixing their tariff, and the Board of Public Utility Commissioners in approving the rates prescribed by them, have taken into consideration the Government's requirements regarding service and revenue. The rates charged by coastwise vessels in the Philippines have been materially increased during the past few years. (16 Official Gazette, 988.)

It is not even claimed that the respondents are not securing adequate returns from their business. And the matter of the different status of the Government and the individual patron is one in which these carriers rightfully have no interest as long as they secure the requisite return upon their property. Willcox *v.* Consolidated Gas Co., 212 U. S. 19, 54. As stated by the Public Utility Commission of Maine in Re Portland Water District, P. U. R. 1917 D 907, 915: "The agreement to furnish water to the city free of cost was no sacrifice, except as it may have

delayed for a short period the acquisition of a paying business. The water company was a monopoly; it could charge reasonable rates—and, lawfully, only reasonable rates—reasonable measured by the return on the investment. If the city did not pay from taxes, the citizens had to make it up from water rates. It made no difference to the company. It, like all other owners of franchises acquired in this way, paid the city for the privilege of charging the citizens enough extra to offset the payment."

As noted in the opinion of Mr. Justice Carson (R. 63) these carriers in the court below placed emphasis on the possibility of an increase in their burden due to a larger volume of mail being offered for carriage some time in the future. It is entirely probable that the paying cargo and the number of coastwise vessels will have a corresponding increase with the quantity of mail. But as courts do not pronounce anticipatory judgments, and legislatures can be expected to note changed conditions, there would appear to be no reason for considering such problematical increase. "One can not invoke to defeat a law an apprehension of what might be done under it and, which if done, might not receive judicial approval." (Lehon *v.* City of Atlanta, 242 U. S. 53, 56.)

The requirement of free carriage of mail has not operated to drive Philippine coastwise shipping to other parts, and the Legislature would doubtless

modify the law if such result seemed imminent. But this is not a valid argument against legislative power in the premises. It is claimed that some of the navigation acts of Congress have operated to cause American owners to register their vessels in other countries, but no one has questioned the power of Congress to enact them. The Philippine coastwise trade is of a monopolistic character, being limited to vessels of Philippine register; so there is no competition with vessels not required to carry mail free. Respondents operate their vessels in the coastwise trade by public permission as evidenced by a license, and use the public property to a considerable extent in their service.

It will be noted that the Philippine Legislature quite recently gave special consideration to the matter of requiring coastwise vessels to carry mail, and saw fit to incorporate a provision covering the prior law and practice into its codification of local administrative law. (Sec. 309, Act No. 2657, known as the Administrative Code. Reenacted as section 568, Act No. 2711.) The burden upon the respondents was not increased by the revision of the statute. The legislative branch is primarily invested with authority to determine what laws are in the public interest. As stated in Dominion Hotel *v.* Arizona, 249 U. S. 265, 268: "The deference due to the judgment of the legislature on the matter has been emphasized again and again. Hebe Co. *v.* Shaw, 248

U. S. 297, 303. Of course, this is especially true when local conditions may affect the answer, conitions that the legislature does but that we can not know." The actual result upon the business concerned was well known to the lawmakers. In the language of this court in Tanner *v.* Little, 240 U. S. 69, 386, their recent approval of this time honored law "may be said to be a judgment from experience as against a judgment from speculation." The two decades of American sovereignty, not to mention previous experience, have demonstrated to the satisfaction of the Philippine Lgeislature that the requirement of this service is neither confiscatory nor unreasonable.

The law relating to the free carriage of mail by marine carriers constitutes a part of the Philippine coastwise license. "A certificate of Philippine register confers upon the vessel the right to engage, consistently with law, in the Philippine coastwise trade * * * " (section 1175, Administrative Code). Said the Supreme Court of Missouri in State *v.* Eastin, 270 Mo. 193, 204, 192 S. W. 1006, 1008: "It is elemental that relator contracted with the city of St. Joseph with full imputed knowledge of, and subject in all ways to, all of the powers and restraints connoted in the above section, and that it is bound thereby just as fully as if these provisions were written at large in its franchise contract with the city of St. Joseph." How-

ever, as observed in Internat'l & G. N. Ry. Co. *v.* Anderson Co., 246 U. S. 424, 432: "But if the law made that requirement, it hardly matters whether the restriction was imposed by charter or otherwise or whether the remote reason for it was a contract or a general notion of public policy."

These respondents voluntarily engaged in the Philippine coastwise trade with full knowledge of the law and established governmental practice requiring the transportation of mail without charge by all vessels plying between Philippine ports. They acquiesced in its enforcement for several decades and in the construction placed upon the President's Instructions to the Philippine Commission and the Act of Congress of July 1, 1902. The obligation assumed by them and all others engaged in the coastwise trade, in consideration of valuable privileges granted by the Government, has not been shown to be oppressive or to have deprived them of a fair return from their business. That it is not confiscatory is proved by a practical test extending over at least half a century.

If the stipulation for and acceptance by the Government of any free service in return for privileges conferred and benefits extended be unconstitutional (without any showing that the business concerned suffers detriment) then the obligation assumed by the Manila Electric Railroad & Light Company to furnish free transportation to members of the city

police and fire departments (R. 55) is void and unenforceable. The construction given the Philippine Organic Act by the court below will deprive the Philippine Government of a service to which it is entitled from vessels documented in the coastwise trade, and as a precedent the decision is replete with possibilities for confusion in connection with obligations assumed by those holding licenses and franchises to do business in that jurisdiction.

CONCLUSION.

This case is clearly ruled in principle by Interstate Railway Co. *v.* Massachusetts, *supra*, and other cases cited. These adjudged cases holding laws of the character here in question to be valid are directly applicable and authoritatively controlling. The insular supreme court's construction of the Organic Act in the present case conflicts with the practice of the Government of the Philippine Islands from the beginning of American sovereignty and prior thereto, and is opposed to the practice of the Federal and State Governments under similar constitutional provisions. It is respectfully submitted that the judgment brought up for review should be reversed.

CHESTER J. GERKIN,
Counsel for Petitioner.

WASHINGTON, D. C.
October, 1919.

APPENDIX.

SECTIONS OF THE ADMINISTRATIVE CODE (ACT NO. 2711 OF THE PHILIPPINE LEGISLATURE) RELATING TO THE PHILIPPINE COASTWISE TRADE.

Section 568. *Authority of Insular officials to make contracts.* * * *

Contracts on behalf of the Insular Government with companies operating vessels engaged in the coastwise trade to secure the carriage of freight and passengers for the Government shall be executed by the Secretary of Commerce and Communications, subject to such restrictions as may be prescribed by law; but vessels engaged in the coastwise trade and vessels plying between Philippine ports shall continue to carry mail free.

Sec. 1175. *Privileges conferred by certificate of Philippine register.*—A certificate of Philippine register confers upon the vessel the right to engage, consistently with law, in the Philippine coastwise trade and entitles it to the protection of the authorities and flag of the United States in all ports and on the high seas, and at the same time secures to it the same privileges and subjects it to the same disabilities as under the laws of the United States pertain to foreign-built vessels transferred abroad to citizens of the United States.

Sec. 1206. *Vessels eligible for coastwise trade.*—The right to engage in the Philippine coastwise trade

is limited to vessels carrying a certificate of Philippine register.

Sec. 1207. *License for coastwise trade.*—All vessels engaging in the coastwise trade except boats of five tons gross or less must be duly licensed annually.

Sec. 1209. *Transportation of passengers and merchandise between Philippine ports.*—Passengers shall not be received at one Philippine port for any other such port by a vessel not licensed for the coastwise trade, except upon special permission previously granted by the Insular Collector; and subject to the same qualification, merchandise embarked at a domestic port shall not be transported by water to any other port in the Islands, either directly or by way of a foreign port, or for any part of the voyage, in any other vessel than one licensed for the coastwise trade.

Passengers or merchandise arriving from abroad upon a foreign vessel may be carried by the same vessel through any port of entry to the port of destination in the Islands without change; and passengers departing from the Islands or merchandise intended for export may be carried in a foreign vessel through a Philippine port without change.

Sec. 1230. *Requirement as to delivery of mail.*—A vessel arriving within a collection district in the Philippine Islands shall not be permitted to make entry or break bulk until it is made to appear, to the satisfaction of the collector of customs, that the

master, consignee, or agent of the vessel is ready to deliver to the postmaster of the nearest post office all mail matter on board of such vessel and destined for that port. Collectors are authorized to examine and search vessels for mail matter carried contrary to law.

Sec. 1340. *Vessel engaging in coastwise trade without license.*—Any vessel engaging in the coastwise trade, without having procured the requisite license therefor, shall, if laden with merchandise of the growth, product, and manufacture of the Philippine Islands only, or in ballast, be fined in a sum not exceeding one thousand pesos.

Sec. 1347. *Failure to deliver or receive mail.*—If the master of a vessel arriving at a Philippine port shall fail or refuse to deliver to the postmaster of the nearest post office, as by law or contract required, all mail matter on board such vessel and destined for the particular port, the vessel shall be fined in a sum not exceeding two hundred pesos.

When any vessel which is required by law or contract to carry mail matter departs from a port or place where mail should be received, without giving the postmaster or other postal officials a reasonable opportunity to deliver to the vessel, or its proper officer, or agent, any mail matter addressed to or destined for the port or place to which the vessel is bound, such vessel shall be subject to the same fine as in the preceding paragraph provided.

Sec. 1414. *Fixed fees.*—For acts done, services rendered, and documents issued by the Bureau of Customs, the following fixed fees shall be charged and collected, by requiring the affixture of documentary customs stamps in the proper amount to the instrument which is the subject of the charge or other paper indicated as the proper recipient of the stamp and by the cancellation of such stamp in a manner to be prescribed by the Insular Collector; and no instrument or paper subject to such charge shall be issued or granted by any customs official until the proper stamp has been affixed and canceled:

(*a*) For each certificate of Philippine register:

1. In case of a vessel of less than fifteen tons gross.....	₱2.50
2. In case of a vessel of from fifteen to five hundred tons gross....	5.00
3. In case of a vessel of more than five hundred tons gross.....	10.00

* * * * * * * *

(*f*) For each coastwise license or renewal thereof:

1. In case of a vessel propelled in whole or in part by steam or other mechanical motive power, per registered net ton..	1.50
2. In case of a sailing vessel or vessel not propelled by steam or other mechanical motive power, per registered net ton..	1.00

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 190.

BOARD OF PUBLIC UTILITY COMMISSIONERS
Petitioners,

v.

YNCHAUSTI & Co., et al,
Respondents.

On Writ of Certiorari to the Supreme Court of the Philippine Islands.

NOTES ON BRIEF FOR RESPONDENTS.

It is not easy to follow some of the reasoning, to discover the relevancy of much of the discussion and citation of authority, or to harmonize many of the observations appearing in the brief submitted on the part of the respondents.

On page 30 of their brief counsel for respondents remark "that the record discloses nothing as to the nature of the licenses originally granted respondents, their acceptance of any institution of American Government and laws, nor as to any other of the facts alleged and assumed by counsel." The fact that respondents appear to have continued in business in the Philippines and not to have questioned the jurisdiction of the Board of Public Utility Commissioners and Courts of those Islands over them,

coupled with the presumption that the laws are observed by both public officials and citizens (or residents), is probably sufficient to cure this alleged hiatus in the record.

As these respondents in complying with the citation of the Board of Public Utility Commissioners to show cause why they should not be directed to continue to carry mail, and at the hearing accorded them by the said Board, attacked the validity of the law, they not only had "a proper and legal opportunity" to present any facts deemed material to this issue, but had the legal duty of doing so.

The burden of showing that the law complained of operated to deprive them of some constitutional right devolved, of course, upon these respondents who assailed its validity. It is passing strange, therefore, that counsel for respondents should be surprised to find a contention in the record which "renders it necessary that some showing be made that property rights of value are being taken from respondents without compensation." (Brief, pp. 33-34.)

Counsel for respondents state that "respondents, nor anyone else so far as we know, ever disputed the legality of free mail carriage under the Spanish law" (brief, p. 3), and admit that they have been carrying the mail in accordance with the established practice "since some time before the change in sovereignty and until they served notice on the Director of Posts" in 1916; but "deny that they ever at any time subsequent to the enactment of the Philippine Organic Act under American sovereignty, voluntarily or in any way acceded to the *legality* of the requirement of free mail service, but on the contrary that they have ex-

pressly protested and continued to protest, by every means in their power, against such contention on the part of the Philippine Government." (Brief, p. 5.)

The only action taken by these respondents prior to the institution of this proceeding which by any latitudinarian view could be construed as a protest against performing the service required of them by law was the application to the Philippine Supreme Court for a writ of prohibition in the latter part of 1912 reported in the case of De Villata *v.* Stanley, 32 Phil. Rep. 541, wherein it was alleged that the Insular Collector of Customs was about to revoke a shipmaster's license who had sailed from a coastwise port without taking the mail. Had they believed that this or any other law governing the coastwise trade infringed their constitutional rights they would undoubtedly have taken steps to secure a prompt determination of that issue.

The remedy provided by section 222 of Act No. 190 of the Philippine Commission (Code of Civil Procedure) has been available to them since September 1, 1901. In Roxas *v.* City of Manila, 9 Phil. Rep. 215, a case in which this summary remedy was successfully invoked, the Chief Justice, delivering the opinion of the Court, said:

> According to Article 349 of the Civil Code, no one shall be deprived of his property, except by competent authority and with sufficient cause of public utility, always after proper indemnity; if this requisite has not been fulfilled the courts must protect, and eventually restore possession to the injured party.
>
> Under section 5 of the Act of Congress of July 1, 1902, no legislation shall be enacted in the Philippine Islands which shall deprive any person of life,

> liberty or property without due process of law; * * * The refusal to grant a license or the enactment of an ordinance whereby a person may be deprived of property or rights, or an attempt thereat is made, without previously indemnifying him therefor, is not, not can it be, due process of law. Id. 221.

These respondents, however, not only voluntarily applied for and accepted licenses to operate vessels in the Philippine coastwise trade for a period of one year, with full knowledge of the law now complained of and the construction placed upon the Organic Act, but have requested renewal of such licenses each succeeding year. Their action and conduct are surely not without legal significance. This requirement was not imposed after the original license had been granted effective for one year or during any twelve months' extension granted at the request of the licensee, but was made a condition of the original license and each renewal thereof.

On page 41 of their brief, counsel for respondents say: "Whether the act be valid or invalid, right or wrong, respondents are being deprived of something of value to them." The only possible right or species of property involved concerns the right of vessels engaged in the Philippine coastwise trade to take tolls for carrying mail between ports of call. If vessels documented for this trade possess this alleged property right their owners ought to be able to point out how it was secured. The Government has never conferred nor recognized it. The right to direct compensation or money payment for this service is not only not granted by the franchise or license authorizing persons to engage in this business, or by its

silence left room for an argument that such right should be presumed; but the law on the statute books, the licenses issued pursuant thereto, and the long-continued practice conclusively negative any such claim.

Although the respondents wholly failed to show any right in vessels licensed for the Philippine coastwise trade to cash payment for carrying mail, the existence of such right has been taken for granted by their counsel and forms the very groundwork of the argument upon the constitutionality of the law in question. This basic premise of counsel is entirely unwarranted. No such right has been shown to exist, and it does not exist.

The requirement that vessels carry mail between ports of call without charge, which condition is exacted of all vessels documented in the Philippine coastwise trade, is in consideration of and part payment for the exclusive and valuable privileges conferred upon the licensee. Vessels documented for this trade have "the protection of the authorities and flag of the United States in all ports and on the high seas"; the free use of docks, wharves and other aids to navigation furnished at large expense by the Government; have been practically exempt from taxation, and permitted to fix rates that furnish a liberal income on their investment. Presumably, the Government has adequately compensated those authorized to operate vessels in its coastwise trade for all duties required in the grant of this privilege.

Marine carriers engaged in the Philippine coastwise trade prescribe their own rates subject to the approval of the Board of Public Utility Commissioners. In approving an increase in the rates charged by respondents and others engaged in the coastwise trade, the Board of Public Utility

Commissioners, in case No. 977, reported in 16 Official Gazette, page 988, stated that their tariff should be such as "to leave a margin of profit on the capital investment of not less than ten per cent per annum." That the burden complained of is inconsiderable when compared with the benefits derived from permission to engage in this business is amply attested by the steady increase of tonnage documented for the Philippine coastwise trade. Several steamship companies, including these respondents, have voluntarily kept vessels in this trade for many decades.

On page 47 of their brief, counsel for respondents say: "The 'just compensation' guaranteed to owners of private property taken for public use cannot be paid in 'benefits,' in whole or in part." The authorities cited under this statement deal with the expropriation of property by private corporations, but counsel apparently intend their remark to apply to the right of the Government to stipulate for and receive service in return for privileges and benefits granted public-service companies. Such a contention may be answered in the language of the Supreme Court of Florida in State v. Peninsular Telephone Co., 75 So. 201, 203: "The bill of complaint proceeds upon the theory that the franchise rights for which the free and reduced-rate phones are furnished to the city are of no value, or else that nothing but cash payments can be received for telephone service. There is nothing in the statute to warrant either assumption. If the franchises granted to the company are not valuable, the agreement to furnish free or reduced-rate phones in return for such franchises would not have been made."

In the recent case of St. Louis, Iron Mountain and Southern Railway Company *v.* United States, decided January 5, 1920, this court, referring to the land-grant acts, said: "Under the earlier acts this railroad, in consideration of benefits received, was bound, when required to transport troops and property of the United States free of charge." The practice of requiring free service of public-utility companies in return for privileges and benefits granted them by the public has been quite common in this country. Legislation involving this principle has been enacted by Congress, the State legislatures, city and municipal councils. And such laws have been sustained by both State and Federal courts under constitutional provisions (bill of rights) similar to those obtaining in the Philippines.

Counsel for respondents assert that: "The law of Spain required the shipowners to carry the mail free; this was lawful under the system of that kingdom, which has not the same constitutional restrictions as we have in our bill of rights. But the sovereignty changed, and after the change the new sovereign enacted a law, a bill of rights, providing, among other things, that private property shall not be taken," etc. (Brief, p. 28.)

The Civil Code of Spain, promulgated in 1889, and extended to the Philippines the same year, provides that:

> Art. 349. No one may be deprived of his property unless it be by competent authority for some purpose of proven public utility and after payment of the proper compensation.

Referring to this provision in the case of Endencia *v.* Loalhati et al, 9 Phil. Rep. 177, 183, Mr. Justice Torres,

delivering the opinion of the Philippine Supreme Court, observed: "These legal precepts, which are based on the fundamental constitution of every civilized country, are confirmed by section 5 of the 'Philippine Bill' dated July 1, 1902, which provides: 'That no law shall be enacted in said Islands which shall deprive any person of life, liberty or property, without due process of law, or deny to any person therein the equal protection of the laws.'"

In the Preface to his annotated edition of the Civil Code of Spain (1918), Judge F. C. Fisher, Associate Justice of the Supreme Court of the Philippine Islands, said: "Notwithstanding the numerous innovations produced, through chance and design, by subsequent enactments, the Civil Code is still essentially the fundamental law governing the acquisition, conveyance, and transmission of property, the incidents of its ownership, and the creation and extinction of contractual and extra-contractual obligations."

If the requirement that vessels licensed to engage in the Philippine coastwise trade shall carry mail without charge constitutes a taking of property for public use without just compensation, it was invalid before the enactment of the Organic Act and, of course, is still unlawful. This would doubtless be true without any constitutional provision or written law upon the subject, both in this country and in Spain; as the principle of natural equity that the individual whose property is thus sacrificed must be indemnified obtains in both countries. In Friend *v.* United States, 30 Ct. Cls. 94, 104–105, our Court of Claims said: "If in legal contemplation there has been a taking of private property as such, no doubt can arise as to the right of the claimant to recover, as the Supreme and this Court

have held in many cases that an implied contract exists whenever the United States appropriates private property, acknowledging it to be such."

The "question at issue" in the present case is stated in the brief submitted by respondents (pp. 10–11), as follows:

> The single question at issue in this case is the validity of that part of section 309 of the Administrative Code of the Philippine Islands (sec. 568 of the Administrative Code, Act No. 2711), which provides that "vessels engaged in the coastwise trade and vessels plying between Philippine ports shall continue to carry mail free." The validity of said act of legislation depends upon the organic law or "constitution" of the Philippine Islands; in other words, the act of Congress approved July 1, 1902 (32 Stat., 691), establishing a government for the Islands, as amended by the subsequent acts of February 6, 1905 (33 Stat., 689), and August 29, 1916 (39 Stat., 545).

While there would appear to be no question about the validity of this law if it were *new* legislation—at least in its application to those subsequently seeking the registration of vessels for the coastwise trade or applying for renewal of licenses upon the expiration of their fixed time limit of one year—the question of statutory construction and constitutional law here presented should, of course, be examined in the light of the evolution of the recent Code provision.

Had the Philippine Legislature been in accord with the view of counsel for respondents that the antecedent law on this subject "was abrogated and nullified by the organic act" (brief, p. 4), it would not have incorporated same

in its codification of the laws in force in the Philippine Islands. Section 3 of the Philippine Administrative Code provides that,—"*Relation of Administrative Code to prior laws.* Such provisions of this Code as incorporate prior laws shall be deemed to be made in continuation thereof and to be in the nature of amendments thereto, without prejudice to any right already accrued." It will be noted that the last enactment of this provision by the Philippine Legislature (sec. 568, Act No. 2711, approved March 10, 1917), was subsequent to the passage of the Act of Congress of August 29, 1916. Said act has been reported to Congress and has not been annulled by that body.

From the beginning of American sovereignty over the Philippine Islands Congress has had access to copies of the laws in force there, and to the official reports of our Government's representatives. The new government had been in operation for some years at the time of the passage of the Philippine Bill. There is not only the legal presumption that the Philippine Organic Act was passed with deliberation and with knowledge of all laws in force in the Islands, but said act affirmatively shows that these laws were considered—those relating to certain subjects being modified and the remainder continued in force.

Counsel for respondents concede (brief, p. 3) that,—"The Organic Act of course had no connection with the prior Spanish law or practice." They contend, however, that the Court should declare this law to have been impliedly repealed; that the general language contained in section 5 of the act of July 1, 1902, and section 3 of the act of August 29, 1916, should be construed as invalidating said law.

As noted above, the provision of the Philippine Organic Act prohibiting the taking of private property for public use without just compensation did not introduce any new principle into the law of the Philippine Islands. In enacting said provision Congress not only adopted the construction given to it in practice in this country, where it had been applied as a part of the Federal Constitution for a century, but the judicial interpretation which it has received is controlling (not merely persuasive) in the Philippine Islands. Counsel for respondents have cited no case, and we have found none, holding that the constitutional provision is violated by the enactment of a law requiring a public utility, in consideration of the acceptance of certain rights and privileges granted by the public or in consideration of the acceptance of any rights and privileges, to furnish the granting government free service for a public purpose—notwithstanding the fact that legislation of this character has frequently been passed by Congress and the several State legislatures.

The construction of this constitutional provision contended for by these respondents is a radical departure from the practice under it and the interpretation it has received up to this time. As the provision of the Philippine Organic Act involved is identical with that contained in the Federal Constitution, and various State constitutions, its construction is of great importance here as well as in the Philippines.

In enacting section 11 of the Organic Act of July 1, 1902, and section 3 of the Act of April 15, 1904 (quoted in petitioner's brief, pp. 11–12), Congress dealt with the subject-matter of the Philippine coastwise trade; and obviously would have annulled the law here in question by explicit

declaration had its repeal been considered advisable. Congress has never indicated its disapproval of said law and, as held in Kealoha *v.* Castle, 210 U. S. 149, 153, ordained its continued enforcement by the Organic Act which provides that "the laws now in force in the Philippines shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States" (sec. 6, Act of August 29, 1916); and "That all laws or parts of laws applicable to the Philippines not in conflict with any of the provisions of this Act are hereby continued in force and effect" (sec. 31, Act of August 29, 1916).

After quoting from cases dealing with the regulation of railroad rates, counsel for respondents observe (brief, p. 20): "It is quite evident from the authorities and cases touching upon this question that despite the acknowledged power of the Government, whether the Federal Government, a State Government, or the Philippine Government, to regulate the compensation and service to be performed by carriers and other public-service enterprises, the authority of none of those governments extends to the imposition of inadequate terms of compensation, and *a fortiori*, can never reach the point of requiring free service." The regulation of the tariff and service of a common carrier after permission to engage in that business has been granted is an entirely distinct matter from that of fixing conditions in the original grant of this privilege with which we have to do in the present case. The marked difference between those cases and this one is manifest.

The Kepner and Weems cases which counsel for respondents assert are "similar to the present case, both

in the close analogy of the circumstances and the identity of the principle involved" (brief, p. 11), dealt with matters of criminal law and have no bearing whatever on the powers of the Government of the Philippine Islands over its coastwise trade. There is not a single feature of analogy between those cases and the present one. They have no relevancy to the issue here joined, and lend no support to respondents' contention that the statute in question is repugnant to the organic law.

Referring to the case of Sutton *v.* State, 244 U. S. 258, counsel for respondents (brief, p. 25) remark that "the principle of the police power of the State, under the most liberal interpretation, could not be invoked in connection with the facts of this case." We need not look beyond the express act of Congress for the source of power in the Government of the Philippine Islands over its public property and coastwise trade. Congress specifically placed the navigable waters and other public property of the Philippine Islands under the control of that government (sec. 12, Act of July 1, 1902; sec. 9, Act of August 29, 1916), and has delegated to that government full authority over its coastwise trade (sec. 3, Act of April 15, 1904, later incorporated in sec. 1, Act of April 29, 1908, 35 Stat. 70).

The case at bar does not deal with the power of the Government to regulate the use of private property devoted to a public use, but the right of the Government to exercise control over the use of its own property (public domain). As owner of the navigable waters and terminal facilities used in the coastwise trade, the Government may impose such conditions as it deems proper in granting private parties the right to use them. This is a proprietary right, not merely the right to regulate. It is derived

from dominion and control over public property. Whatever Congress may do in the exercise of its plenary sovereignty over the Philippines, it may delegate that power to the Philippine Government (Ling Su Fan *v.* United States, 218 U. S. 302).

Subsequent to the filing of the brief for petitioner in this case a judgment was entered by the Supreme Court of the Philippines in a case involving the powers of the local government over its coastwise trade. The opinion in the case of Smith, Bell & Co. *v.* Natividad, 17 Off. Gaz. 1609, is hereto appended. In that case the court held valid a recent act of the Philippine Legislature (No. 2761) which made corporations having any alien stockholders ineligible to receive a coastwise license. Smith, Bell & Co., a Philippine corporation, was the owner of a vessel adapted to the Philippine coastwise trade which had been documented for and employed in said trade for some years. The corporation contended "that Act No. 2761 deprives the corporation of its property without due process of law because by the passage of the law the company was automatically deprived of every beneficial attribute of ownership in the *Bato* and left with the naked title to a boat it could not use." The points in said decision to which attention is particularly invited are thus stated in the *syllabus* by the court:

> 7. No one of the provisions of the Philippine Organic Act could have had the effect of denying to the Government of the Philippine Islands, acting through its Legislature, the right to exercise that most essential, insistent, and illimitable of powers, the sovereign police power, in the promotion of the general welfare and the public interest.

> 11. Common carriers which, in the Philippines as in the United States and other countries, are affected with a public interest, can only be permitted to use the public waters, deemed a part of the national domain and open to public use, as a privilege, and under such conditions as to the legislature may seem wise.

The Philippines had a postal service in operation and a body of law governing its coastwise trade, at the time of the change of sovereignty from Spain to the United States. That body of law, including the one now complained of, was continued in force. It received a practical construction, with reference to Philippine Organic Law, both before and after the change of sovereignty. This construction received the contemporaneous and continued assent of these respondents, as evidenced by their voluntary renewal of licenses for the continuance of vessels in the coastwise trade. There has been no showing, within any of the authorities upon this subject, that respondents are being deprived of any property.

Respectfully submitted.

CHESTER J. GERKIN,
Counsel for Petitioner.

WASHINGTON, D. C.
January, 1920.

SUPREME COURT OF THE PHILIPPINE ISLANDS.
17 Official Gazette, p. 1609.
No. 15574. Decided September 17, 1919.

SMITH, BELL & COMPANY (LTD.), petitioners, vs. JOAQUIN NATIVIDAD, Collector of Customs of the port of Cebu, respondent.

1. CONSTITUTIONAL LAW; PHILIPPINE BILL OF RIGHTS; CONSTRUCTION.—The guaranties extended by the Congress of the United States to the Philippine Islands have been used in the same sense as like provisions found in the United States Constitution.

2. ID.; ID.; FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS; ALIENS.—The guaranties of the Fourteenth Amendment and so of the first paragraph of the Philippine Bill of Rights, are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or nationality.

3. ID.; ID.; ID.; ID.; ID.—The word "person" found in the Fourteenth Amendment and in the first sentence of the first paragraph of the Philippine Bill of Rights includes aliens.

4. ID.; ID.; ID.; ID.; ID.—Private corporations are "persons" within the scope of the guaranties in so far as their property is concerned.

5. ID.; ID.; ID.; ID.; ID.—Statutes which have attempted arbitrarily to forbid aliens to engage in any kind of business to earn their living have been held unconstitutional,

while other statutes denying certain rights to aliens have been held constitutional.

6. ID.; ID.; ID.; ID.; ID.; POLICE POWER.—Neither the Fourteenth Amendment to the United States Constitution, broad and comprehensive as it is, nor any other amendment, "was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts." (Barbier *v.* Connolly [1884], 113 U. S., 27; New Orleans Gas Co. *v.* Louisiana Light Co. [1885], 115 U. S., 650).

7. ID.; ID.; ID.; ID.; ID.; ID.—No one of the provisions of the Philippine Organic Law could have had the effect of denying to the Government of the Philippine Islands, acting through its Legislature, the right to exercise that most essential, insistent, and illimitable of powers, the sovereign police power, in the promotion of the general welfare and the public interest.

8. ID.; ID.; ID.; ID.; ID.; ID.—The public domain or the common property or resources of the people of the State may be so regulated or distributed as to limit the use to its citizens.

9. ID.; ID.; ID.; ID.; ID.; ID.—The limitation of employment in the construction of public works by, or for, a State or a municipality to citizens of the United States or of a State is permitted.

10. ID.; ID.; ID.; ID.; ID.; ID.—Our local experience and our peculiar local conditions, often of controlling effect, has caused the executive branch of the Government of the Philippine Islands, always later with the sanction of the judicial branch, to take a firm stand with reference to the presence of undesirable foreigners. The Government has thus assumed to act for the all-sufficient and primitive reason of the benefit and protection of its own citizens and of the self-preservation and integrity of its dominion.

11. ID.; ID.; ID.; ID.; ID.; ID.—Common carriers which, in the Philippines as in the United States and other countries, are affected with a public interest, can only be permitted to use the public waters, deemed a part of the national domain and open to public use, as a privilege, and under such conditions as to the Legislature may seem wise.

12. ID.; CONSTRUCTION; PUBLIC POLICY.—The judiciary, alive to the dictates of the national welfare, can properly incline the scales of their decisions in favor of that solution which will most effectively promote the public policy.

13. ID.; ID.; PRESUMPTION.—All the presumption is in favor of the constitutionality of the law, and without good and strong reasons a court should not attempt to nullify the action of the Legislature.

14. ID.; ID.; ID.—That is the true construction which will best carry legislative intention into effect.

15. ID.; COMMERCE; UNITED STATES COASTWISE TRADE. —The power to regulate commerce, expressly delegated to the Congress by the Constitution, includes the power to nationalize ships built and owned in the United States by

registries and enrollments, and the recording of the muniments of title of American vessels.

16. ID.; ID.; ID.—Under the Acts of Congress of December 31, 1792, and February 18, 1793 (1 Stat. at L., 287, 305), in case of alienation to a foreigner, all the privileges of an American bottom were *ipso facto* forfeited. No vessel in which a foreigner was directly or indirectly interested could lawfully be registered as a vessel of the United States.

17. ID.; ID.; ID.—The Act of Congress of May 28, 1895 (29 Stat. at L., 188), extended the privileges of registry from vessels wholly owned by a citizen or citizens of the United States to corporations created under the laws of any of the States thereof. This law made it possible for a domestic corporation to obtain the registry or enrollment of its vessels even though some stock of the corporation was owned by aliens.

18. ID.; ID.; PHILIPPINE COASTWISE TRADE; ACT NO. 2761; VALIDITY.—The history of the different laws which have concerned the Philippine coastwise trade is set out in the opinion. The last Act on the subject, No. 2761, has returned to the restrictive idea of the original Customs Administrative Act which in turn was merely a reflection of the statutory language of the first American Congress.

19. ID.; ID.; ID.; ID.—Without any subterfuge, the apparent purpose of the Philippine Legislature is seen to be to enact an anti-alien shipping act. The ultimate purpose of the Legislature is to encourage Philippine shipbuilding.

20. ID.; ID.; ID.; ID.—The Philippine Legislature made up entirely of Filipinos, representing the mandate of the Filipino people and the guardian of their rights, acting

under practically autonomous powers, and imbued with a strong sense of Philippinism, has desired for these Islands safety from foreign interlopers, the use of the common property exclusively by its citizens and the citizens of the United States, and protection for the common good of the people.

21. ID.; ID.; ID.; ID.—Act No. 2761 of the Philippine Legislature, limiting certificates of Philippine registry to vessels of domestic ownership vested in some one or more of the following classes of persons: (*a*) citizens or native inhabitants of the Philippine Islands; (*b*) citizens of the United States residing in the Philippine Islands; (*c*) any corporation or company composed wholly of citizens of the Philippine Islands or of the United States or of both, is authorized by the Act of Congress of April 29, 1908, with its specific delegation of authority to the Government of the Philippine Islands to regulate the transportation of merchandise and passengers between ports or places therein, and by the grant by the Act of Congress of August 29, 1916, of general legislative power to the Philippine Legislature.

22. ID.; ID.; ID.; ID.—While the plaintiff, a corporation having alien stockholders, is entitled to the protection afforded by the due process of law and equal protection of the laws clause of the Philippine Bill of Rights, yet Act No. 2761, in denying to corporations such as the plaintiff the right to register vessels in the Philippine coastwise trade, does not belong to that vicious species of class legislation which must always be condemned, but falls within authorized exceptions, notably, within the purview of the police power.

23. ID.; ID.; ID.; ID.—Act No. 2761 does not violate the provisions of paragraph 1 of section 3 of the Act of Congress of August 29, 1916, providing "that no law shall be enacted in said Islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws."

24. ID.; ID.; ID.; ID.—Act No. 2761 is held to be valid and constitutional.

ORIGINAL ACTION in the Supreme Court. Mandamus.
The facts are stated in the opinion of the court.
Ross & LAWRENCE for petitioner.
Attorney-General PAREDES for respondent.

MALCOLM, *J.*:

A writ of mandamus is prayed for by Smith, Bell & Co. (Ltd.), against Joaquin Natividad, Collector of Customs of the port of Cebu, Philippine Islands, to compel him to issue a certificate of Philippine registry to the petitioner for its motor vessel *Bato*. The Attorney-General, acting as counsel for respondent, demurs to the petition on the general ground that it does not state facts sufficient to constitute a cause of action. While the facts are thus admitted, and while, moreover, the pertinent provisions of law are clear and understandable, and interpretative American jurisprudence is found in abundance, yet the issue submitted is not lightly to be resolved. The question, flatly presented, is, whether Act No. 2761 of the Philippine Legislature is valid—or, more directly stated, whether the Government of the Philippine Islands, through its Legislature, can deny the registry of vessels in its coastwise trade to corporations having alien stockholders.

FACTS.

Smith, Bell & Co., (Ltd.), is a corporation organized and existing under the laws of the Philippine Islands. A majority of its stockholders are British subjects. It is the owner of a motor vessel known as the *Bato* built for it in the Philippine Islands in 1916, of more than fifteen tons gross. The *Bato* was brought to Cebu in the present year for the purpose of transporting plaintiff's merchandise between ports in the Islands. Application was made at Cebu, the home port of the vessel, to the Collector of Customs for a certificate of Philippine registry. The Collector refused to issue the certificate, giving as his reason that all the stockholders of Smith, Bell & Co., Ltd., were not citizens either of the United States or of the Philippine Islands. The instant action is the result.

LAW.

The Act of Congress of April 29, 1908, repealing the Shipping Act of April 30, 1906, but reenacting a portion of section 3 of this law, and still in force, provides in its section 1:

> That until Congress shall have authorized the registry as vessels of the United States of vessels owned in the Philippine Islands, the Government of the Philippine Islands is hereby authorized to adopt, from time to time, and enforce regulations governing the transportation of merchandise and passengers between ports or places in the Philippine Archipelago. (35 Stat. at L. 70; Section 3912, U. S. Comp., Stat. [1916]; 7 Pub. Laws 364.)

The Act of Congress of August 29, 1916, commonly known as the Jones Law, still in force, provides in sections 3 (first paragraph, first sentence), 6, 7, 8, 10, and 31, as follows:

SEC. 3. That no law shall be enacted in said Islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws. * * *

SEC. 6. That the laws now in force in the Philippines shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States.

SEC. 7. That the legislative authority herein provided shall have power, when not inconsistent with this Act, by due enactment to amend, alter, modify, or repeal any law, civil or criminal, continued in force by this Act as it may from time to time see fit.

This power shall specifically extend with the limitation herein provided as to the tariff to all laws relating to revenue and taxation in effect in the Philippines.

SEC. 8. That general legislative power, except as otherwise herein provided, is hereby granted to the Philippine Legislature, authorized by this Act.

SEC. 10. That while this Act provides that the Philippine Government shall have the authority to enact a tariff law the trade relations between the Islands and the United States shall continue to be governed exclusively by laws of the Congress of the United States: *Provided*, That tariff acts or acts amendatory to the tariff of the Philippine Islands shall not become law until they shall receive the approval of the President of the United States, nor shall any act of the Philippine Legislature affecting immigration or the currency or coinage laws of the Philippines become a law until it has

been approved by the President of the United States: *Provided further*, That the President shall approve or disapprove any act mentioned in the foregoing proviso within six months from and after its enactment and submission for his approval, and if not disapproved within such time it shall become a law the same as if it had been specifically approved.

SEC. 31. That all laws or parts of laws applicable to the Philippines not in conflict with any of the provisions of this Act are hereby continued in force and effect. (39 Stat. at L. 546.)

On February 23, 1918, the Philippine Legislature enacted Act No. 2761. The first section of this law amended section 1172 of the Administrative Code to read as follows:

SEC. 1172. *Certificate of Philippine register.*—Upon registration of a vessel of domestic ownership, and of more than fifteen tons gross, a certificate of Philippine register shall be issued for it. If the vessel is of domestic ownership and of fifteen tons gross or less, the taking of the certificate of Philippine register shall be optional with the owner.

"Domestic ownership," as used in this section, means ownership vested in some one or more of the following classes of persons: (*a*) Citizens or native inhabitants of the Philippine Islands; (*b*) citizens of the United States residing in the Philippine Islands; (*c*) *any corporation or company composed wholly of citizens of the Philippine Islands or of the United States or of both*, created under the laws of the United States, or of any State thereof, or of the Philippine Islands, provided some duly authorized officer thereof, or the managing agent or master of the vessel, resides in the Philippine Islands.

Any vessel of more than fifteen gross tons which on February eighth, nineteen hundred and eighteen, had a certificate of Philippine register under

existing law, shall likewise be deemed a vessel of domestic ownership so long as there shall not be any change in the ownership thereof nor any transfer of stock of the companies or corporations owning such vessel to persons not included under the last preceding paragraph.

Section 2 and 3 of Act No. 2761 amended sections 1176 and 1202 of the Administrative Code to read as follows:

SEC. 1176. *Investigation into character of vessel.—No application for a certificate of Philippine register shall be approved until the collector of customs is satisfied* from an inspection of the vessel that it is engaged or destined to be engaged in legitimate trade and *that it is of domestic ownership as such ownership is defined in section eleven hundred and seventy-two of this Code.*

"The collector of customs may at any time inspect a vessel or examine its owner, master, crew, or passengers in order to ascertain whether the vessel is engaged in legitimate trade and is entitled to have or retain the certificate of Philippine register.

SEC. 1202. *Limiting number of foreign officers and engineers on board vessels.*—No Philippine vessel operating in the coastwise trade or on the high seas shall be permitted to have on board more than one master or one mate and one engineer who are not citizens of the United States or of the Philippine Islands, even if they hold licenses under section one thousand one hundred and ninety-nine hereof. No other person who is not a citizen of the United States or of the Philippine Islands shall be an officer or a member of the crew of such vessel. Any such vessel which fails to comply with the terms of this section shall be required to pay an additional tonnage tax of fifty centavos per net ton per month during the continuance of said failure.

Issues.

Predicated on these facts and provisions of law, the issues as above stated recur, namely, whether Act No. 2761 of the Philippine Legislature is valid in whole or in part—whether the Government of the Philippine Islands, through its Legislature, can deny the registry of vessels in its coastwise trade to corporations having alien stockholders.

Opinion.

1. Considered from a positive standpoint, there can exist no measure of doubt as to the power of the Philippine Legislature to enact Act No. 2761. The Act of Congress of April 29, 1908, with its specific delegation of authority to the Government of the Philippine Islands to regulate the transportation of merchandise and passengers between ports or places therein, the liberal construction given to the provisions of the Philippine Bill, the Act of Congress of July 1, 1902, by the courts, and the grant by the Act of Congress of August 29, 1916, of general legislative power to the Philippine Legislature, are certainly superabundant authority for such a law. While the Act of the local legislature may in a way be inconsistent with the Act of Congress regulating the coasting trade of the Continental United States, yet the general rule that only such laws of the United States have force in the Philippines as are expressly extended thereto, and the abnegation of power by Congress in favor of the Philippine Islands, would leave no starting point for convincing argument. As a matter of fact, counsel for petitioner does not assail legislative action from this direction. (See U. S. *v.* Bull [1910], 15 Phil., 7; Sinnot *v.* Davenport [1859], 22 How., 227.)

2. It is from the negative, prohibitory standpoint that counsel argues against the constitutionality of Act No. 2761. The first paragraph of the Philippine Bill of Rights of the Philippine Bill, repeated again in the first paragraph of the Philippine Bill of Rights as set forth in the Jones Law, provides "That no law shall be enacted in said Islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws." Counsel says that Act No. 2761 denies to Smith, Bell & Co., Ltd., the equal protection of the laws because it, in effect, prohibits the corporation from owning vessels, and because classification of corporations based on the citizenship of one or more of their stockholders is capricious, and that Act No. 2761 deprives the corporation of its property without due process of law because by the passage of the law the company was automatically deprived of every beneficial attribute of ownership in the *Bato* and left with the naked title to a boat it could not use.

The guaranties extended by the Congress of the United States to the Philippine Islands have been used in the same sense as like provisions found in the United States Constitution. While the "due process of law and equal protection of the laws" clause of the Philippine Bill of Rights is couched in slightly different words than the corresponding clause of the Fourteenth Amendment to the United States Constitution, the first should be interpreted and given the same force and effect as the latter. (Kepner *v.* U. S. [1904], 195 U. S., 100; Serra *v.* Mortiga [1907], 204 U. S., 470; U. S. *v.* Bull [1910], 15 Phil., 7.) The meaning of the Fourteenth Amendment has been announced in classic decisions of the United States Su-

preme Court. Even at the expense of restating what is so well known, these basic principles must again be set down in order to serve as the basis of this decision.

The guaranties of the Fourteenth Amendment and so of the first paragraph of the Philippine Bill of Rights, are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or nationality. The word "person" includes aliens. (Yick Wo *v.* Hopkins [1886], 118 U. S., 356; Traux *v.* Raich [1915], 239 U. S., 33.) Private corporations, likewise, are "persons" within the scope of the guaranties in so far as their property is concerned. (Santa Clara County *v.* Southern Pac. R. R. Co. [1886], 118 U. S., 394; Pembina Mining Co. *v.* Pennsylvania [1888], 125 U. S., 181; Covington & L. Turnpike Road Co. *v.* Sandford [1896], 164 U. S. 578.) Classification with the end in view of providing diversity of treatment may be made among corporations, but must be based upon some reasonable ground and not be a mere arbitrary selection. (Gulf, Colorado & Santa Fe Railway Co. *v.* Ellis [1897], 165 U. S., 150.) Examples of laws held unconstitutional because of unlawful discrimination against aliens could be cited. Generally, these decisions relate to statutes which had attempted arbitrarily to forbid aliens to engage in ordinary kinds of business to earn their living. (State *v.* Montgomery [1900], 94 Maine, 192, peddling—but see Commonwealth *v.* Hana [1907], 195 Mass., 262: Templar *v.* Board of Examiners of Barbers [1902], 131 Mich., 254, barbers; Yick Wo *v.* Hopkins [1886], 118 U. S., 356, discrimination against Chinese; Traux *v.* Raich [1915], 239 U. S., 33; *In re* Parrott [1880], 1 Fed., 481; Fraser *v.*

McConway & Torley Co. [1897], 82 Fed., 257; Juniata Limestone Co. *v.* Fagley [1898], 187 Penn., 193, all relating to the employment of aliens by private corporations.)

A literal application of general principles to the facts before us would, of course, cause the inevitable deduction that Act No. 2761 is unconstitutional by reason of its denial to a corporation, some of whose members are foreigners, of the equal protection of the laws. Like all beneficent propositions, deeper research discloses provisos. Examples of a denial of rights to aliens notwithstanding the provisions of the Fourteenth Amendment could be cited. (Tragresser *v.* Gray [1890], 73 Md., 250, licenses to sell spirituous liquors denied to persons not citizens of the United States; Commonwealth *v.* Hana [1907], 195 Mass., 262, excluding aliens from the right to peddle; Patsone *v.* Commonwealth of Pennsylvania [1914], 232 U. S., 138, prohibiting the killing of any wild bird or animal by any unnaturalized foreign-born resident; *Ex parte* Gilleti [1915], 70 Fla., 442, discriminating in favor of citizens with reference to the taking for private use of the common property in fish and oysters found in the public waters of the State; Heim *v.* McCall [1915], 239 U. S., 175, and Crane *v.* New York [1915], 239 U. S., 195, limiting employment on public works by, or for, the State or a municipality to citizens of the United States.)

One of the exceptions to the general rule, most persistent and far reaching in influence, is that neither the Fourteenth Amendment to the United States Constitution, broad and comprehensive as it is, nor any other amendment, "was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order

of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts." (Barbier *v.* Connolly [1884], 113 U. S., 27; New Orleans Gas Co. *v.* Louisiana Light Co. [1885], 115 U. S., 650.) This is the same police power which the United States Supreme Court says "extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people." (Bacon *v.* Walker [1907], 204 U. S., 311.) For quite similar reasons, no one of the provisions of the Philippine Organic Law could have had the effect of denying to the Government of the Philippine Islands, acting through its Legislature, the right to exercise that most essential, insistent, and illimitable of powers, the sovereign police power, in the promotion of the general welfare and the public interest. (U. S. *v.* Toribio [1910], 15 Phil., 85; Churchill and Tait *v.* Rafferty [1915], 32 Phil., 580; Rubi *v.* Provincial Board of Mindoro [1919], 17 Off. Gaz., 377.) Another notable exception permits of the regulation or distribution of the public domain or the common property or resources of the people of the State, so that the use may be limited to its citizens. (*Ex parte* Gilletti [1915], 70 Fla., 442; McCready *v.* Virginia [1876], 94 U. S., 391; Patsone *v.* Pennsylvania [1914], 232 U. S., 138.) Still another exception permits of the limitation of employment in the construction of public works by, or for, the State or a municipality to citizens of the United States or of the State. (Atkin *v.* Kansas [1903], 191 U. S., 207; Heim *v.* McCall [1915], 239 U. S., 175; Crane *v.* New York [1915],

239 U. S., 195.) Even as to classification, it is admitted that a State may classify with reference to the evil to be prevented; the question is a practical one, dependent upon experience. (Patsone *v.* Commonwealth of Pennsylvania [1914], 232 U. S., 138.)

To justify that portion of Act No. 2761 which permits corporations or companies to obtain a certificate of Philippine registry only on condition that they be composed wholly of citizens of the Philippine Islands or of the United States or both, as not infringing Philippine organic law, must be done under some one of the exceptions here mentioned. This must be done, moreover, having particularly in mind what is so often of controlling effect in this jurisdiction—our local experience and our peculiar local conditions.

To recall a few facts in geography, within the confines of Philippine jurisdictional limits are found more than three thousand islands. Literally, and absolutely, steamship lines are, for an insular territory thus situated, the arteries of commerce. If one be severed, the life-blood of the nation is lost. If on the other hand these arteries are protected, then the security of the country and the promotion of the general welfare is sustained. Time and again, with such conditions confronting it, has the executive branch of the Government of the Philippine Islands, always later with the sanction of the judicial branch, taken a firm stand with reference to the presence of undesirable foreigners. The Government has thus assumed to act for the all sufficient and primitive reason of the benefit and protection of its own citizens and of the self-preservation and integrity of its dominion. (*In re* Patterson

[1902], 1 Phil., 93; Forbes *v.* Chuoco, Tiaco [1910], 16 Phil., 534; 228 U. S., 549; *In re* Dick [1918], 38 Phil., 41.) Boats owned by foreigners, particularly by such solid and reputable firms as the instant claimant, might indeed traverse the waters of the Philippines for ages without doing any particular harm. Again, some evil-minded foreigner might very easily take advantage of such lavish hospitality to chart Philippine waters, to obtain valuable information for unfriendly foreign powers, to stir up insurrection, or to prejudice Filipino or American commerce. Moreover, under the Spanish portion of Philippine law, the waters within the domestic jurisdiction are deemed part of the national domain, open to public use. (Book II, Tit. IV, Ch. I, Civil Code; Spanish Law of Waters of August 3, 1866, Arts. 1, 2, 3.) Common carriers which in the Philippines as in the United States and other countries are, as Lord Hale said "affected with a public interest," can only be permitted to use these public waters as a privilege and under such conditions as to the representatives of the people may seem wise. (See De Villata *v.* Stanley [1915], 32 Phil., 641.)

In Patsone *v.* Pennsylvania ([1913], 232 U. S., 134), a case hereinbefore mentioned, Mr. Justice Holmes delivering the opinion of the United States Supreme Court said:

> This statute makes it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal except in defense of person or property, and "to that end" makes it unlawful for such foreign-born person to own or be possessed of a shotgun or rifle; with a penalty of $25 and a forfeiture of the gun or guns. The plaintiff in error was found guilty and was sentenced to pay the above-mentioned fine. The judgment was affirmed on suc-

cessive appeals. (231 Pa., 46, 79 Atl., 928.) He brings the case to this court on the ground that the statute is contrary to the 14th Amendment and also is in contravention of the treaty between the United States and Italy, to which latter country the plaintiff in error belongs.

Under the 14th Amendment the objection is two fold; unjustifiably depriving the alien of property, and discrimination against such aliens as a class. But the former really depends upon the latter, since it hardly can be disputed that if the lawful object, the protection of wild life (Geer *v.* Connecticut, 161 U. S., 519; 40 L. ed., 793; 16 Sup. Ct. Rep., 600), warrants the discrimination, the means adopted for making it effective also might be adopted. * * *

The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. * * *

The question therefore narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. (Barrett *v.* Indiana, 229 U. S., 26, 29, 57 L. ed., 1050, 1052; 33 Sup. Ct. Rep., 692.)

Obviously the question so stated is one of local experience, on which this court ought to be very slow to declare that the State legislature was wrong in its facts. (Adams *v.* Milwaukee, 228 U. S.,

572, 583; 57 L. ed., 971, 977; 33 Sup. Ct. Rep. 610.) If we might trust popular speech in some States it was right; but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong.

Judgment affirmed.

We are inclined to the view that while Smith, Bell & Co., Ltd., a corporation having alien stockholders, is entitled to the protection afforded by the due process of law and equal protection of the laws clause of the Philippine Bill of Rights, nevertheless, Act No. 2761 of the Philippine Legislature, in denying to corporations such as Smith, Bell & Co. Ltd., the right to register vessels in the Philippines coastwise trade, does not belong to that vicious species of class legislation which must always be condemned, but does fall within authorized exceptions, notably, within the purview of the police power, and so does not offend against the constitutional provision.

This opinion might well be brought to a close at this point. It occurs to us, however, that the legislative history of the United States and the Philippine Islands, and, probably, the legislative history of other countries, if we were to take the time to search it out, might disclose similar attempts at restrictions on the right to enter the coastwise trade, and might thus furnish valuable aid by which to ascertain and, if possible, effectuate legislative intention.

3. The power to regulate commerce, expressly delegated to the Congress by the Constitution, includes the power to nationalize ships built and owned in the United States by registries and enrollments, and the recording of the muniments of title of American vessels. The Congress "may

encourage or it may entirely prohibit such commerce, and it may regulate in any way it may see fit between these two extremes." (U. S. *v.* Craig [1886], 28 Fed., 795; Gibbons *v.* Ogden [1824], 9 Wheat., 1; The Passenger Cases [1849], 7 How., 283.)

Acting within the purview of such power, the first Congress of the United States had not been long convened before it enacted on September 1, 1789, "An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes." Section 1 of this law provided that for any ship or vessel to obtain the benefits of American registry, it must belong wholly to a citizen or citizens of the United States "and no other." (1 Stat. at L. 55.) That Act was shortly after repealed, but the same idea was carried into the Acts of Congress of December 31, 1792, and February 18, 1793. (1 Stat. at L. 287, 305.) Section 4 of the Act of 1792 provided that in order to obtain the registry of any vessel, an oath shall be taken and subscribed by the owner, or by one of the owners thereof, before the officer authorized to make such registry, declaring, "that there is no subject or citizen of any foreign prince or state, directly or indirectly, by way of trust, confidence, or otherwise, interested in such vessel, or in the profits or issues thereof." Section 32 of the Act of 1793 even went so far as to say "that if any licensed ship or vessel shall be transferred to any person who is not at the time of such transfer a citizen of and resident within the United States, * * * every such vessel with her tackle, apparel, and furniture, and the cargo found on board her, shall be forfeited." In case of alienation to a foreigner, Mr. Chief Justice Marshall said, all the privi-

leges of an American bottom were *ipso facto* forfeited. (U. S. *v.* Willings and Francis [1807], 4 Cranch, 48.) Even as late as 1873, the Attorney-General of the United States was of the opinion that under the provisions of the Act of December 31, 1792, no vessel in which a foreigner is directly or indirectly interested can lawfully be registered as a vessel of the United States. (14 Op. Atty.-Gen. [U. S.], 340.)

These laws continued in force without contest, although possibly the Act of March 3, 1825, may have affected them, until amended by the Act of May 28, 1896 (29 Stat. at L., 188) which extended the privileges of registry from vessels wholly owned by a citizen or citizens of the United States to corporations created under the laws of any of the States thereof. The law, as amended, made possible the deduction that a vessel belonging to a domestic corporation was entitled to registry or enrollment even though some stock of the company be owned by aliens. The right of ownership of stock in a corporation was thereafter distinct from the right to hold the property by the corporation. (Humphreys *v.* McKissock [1890], 140 U. S., 304; Queen *v.* Arnaud [1846], 9 Q. B., 806; 29 Op. Atty.-Gen. [U. S.], 188.)

On American occupation of the Philippines, the new Government found a substantive law in operation in the Islands with a civil law history which it wisely continued in force. Article fifteen of the Spanish Code of Commerce permitted any foreigner to engage in Philippine trade if he had legal capacity to do so under the laws of his nation. When the Philippine Commission came to enact the Customs Administrative Act (No. 355) in 1902, it returned to

the old American policy of limiting the protection and flag of the United States to vessels owned by citizens of the United States or by native inhabitants of the Philippine Islands. (Sec. 117.) Two years later, the same body reverted to the existing Congressional law by permitting certificates to be issued to a citizen of the United States or to a corporation or company created under the laws of the United States or of any State thereof or of the Philippine Islands. (Act No. 1235, sec. 3.) The two administrative codes repeated the same provision with the necessary amplification of inclusion of citizens or native inhabitants of the Philippine Islands (Adm. Code of 1916, sec. 1345; Adm. Code of 1917, sec. 1172). And now Act No. 2761 has returned to the restrictive idea of the original Customs Administrative Act which in turn was merely a reflection of the statutory language of the first American Congress.

Provisions such as those in Act No. 2761, which deny to foreigners the right to a certificate of Philippine registry, are thus found not to be as radical as a first reading would make them appear.

Without any subterfuge, the apparent purpose of the Philippine Legislature is seen to be to enact an anti-alien shipping act. The ultimate purpose of the legislature is to encourage Philippine shipbuilding. This, without doubt, has, likewise, been the intention of the United States Congress in passing navigation or tariff laws on different occasions. The object of such a law, the United States Supreme Court once said, was to encourage American trade, navigation, and shipbuilding by giving American shipowners exclusive privileges. (Old Dominion Steamship Co. *v.* Virginia [1905], 198 U. S., 299; Kent's Commentaries, Vol. 3, p. 139.)

In the concurring opinion of Mr. Justice Johnson in Gibbons *v.* Ogden ([1824], 9 Wheat., 1) is found the following:

> Licensing acts, in fact, in legislation, are universally restraining acts; as, for example, acts licensing gaming houses, retailers of spirituous liquors, etc. The act, in this instance, is distinctly of that character, and forms part of an extensive system, the object of which is to encourage American shipping, and place them on an equal footing with the shipping of other nations. Almost every commercial nation reserves to its own subjects a monopoly of its coasting trade; and a countervailing privilege in favor of American shipping is contemplated in the whole legislation of the United States on this subject. It is not to give the vessel an American character that the license is granted; that effect has been correctly attributed to the act of her enrollment. But it is to confer on her American privileges, as contradistinguished from foreign; and to preserve the Government from fraud by foreigners, in surreptitiously intruding themselves into the American commercial marine, as well as frauds upon the revenue in the trade coastwise, that this whole system is projected.

The United States Congress in assuming its grave responsibility of legislating wisely for a new country did so imbued with a spirit of Americanism. Domestic navigation and trade, it decreed, could only be carried on by citizens of the United States. If the representatives of the American people acted in this patriotic manner to advance the national policy, and if their action was accepted without protest in the courts, who can say that they did not enact such beneficial laws under the all-pervading police power, with the prime motive of safeguarding the country

and of promoting its prosperity? Quite similarly, the Philippine Legislature, made up entirely of Filipinos, representing the mandate of the Filipino people and the guardian of their rights, acting under practically autonomous powers, and imbued with a strong sense of Philippinism, has desired for these Islands safety from foreign interlopers, the use of the common property exclusively by its citizens and the citizens of the United States, and protection for the common good of the people. Who can say, therefore, especially can a court, that with all the facts and circumstances affecting the Filipino people before it, the Philippine Legislature has erred in the enactment of Act No. 2761?

Surely, the members of the judiciary are not expected to live apart from active life, in monastic seclusion amidst dusty tomes and ancient records, but as keen spectators of passing events, and alive to the dictates of the general—the national—welfare, can incline the scales of their decisions in favor of that solution which will most effectively promote the public policy. All the presumption is in favor of the constitutionality of the law, and without good and strong reasons a court should not attempt to nullify the action of the legislature. "In construing a statute enacted by the Philippine Commission (legislature), we deem it our duty not to give it a construction which would be repugnant to an Act of Congress, if the language of the statute is fairly susceptible of another construction not in conflict with the higher law." (*In re* Guariña [1913], 24 Phil., 36; U. S. *v.* Ten Yu [1912], 24 Phil., 1.) That is the true construction which will best carry legislative intention into effect.

With full consciousness of the importance of the question, we nevertheless are clearly of the opinion that the limitation of domestic ownership for purposes of obtaining a certificate of Philippine registry in the coastwise trade to citizens of the Philippine Islands, and to citizens of the United States, does not violate the provisions of paragraph 1 of section 3 of the Act of Congress of August 29, 1916. No treaty right is relied upon. Act No. 2761 of the Philippine Legislature is held valid and constitutional.

The petition for a writ of mandamus is denied, with costs against the petitioner. So ordered.

Arellano, C. J., Torres, Johnson, Araullo, Street, Avanceña, and Moir, JJ., concur.

Writ denied.

INDEX.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 190.

BOARD OF PUBLIC UTILITY COMMISSIONERS

vs.

YNCHAUSTI & COMPANY ET AL.

BRIEF FOR RESPONDENTS.

This case comes before the court upon a writ of certiorari granted October 21, 1918, directed to the Supreme Court of the Philippine Islands, to review the decision of that court rendered January 23, 1918. The facts disclosed by the record, in summarized form, are as follows:

The respondents, Ynchausti & Company, Compañia General de Tabacos de Filipinos, J. M. Poizat & Company, and Fernandez Hermanos, are partnerships, and in the case of the Compañia General de Tabacos, a corporation, engaged in the coastwise trade of the Philippine Islands. Petitioner, as its title suggests, is an administrative board organized under an act of the Philippine Legislature, charged with the duty of administering the laws with respect to public utilities.

March 1, 1916, the Governor General, by proclamation, made effective an act of the Philippine Legislature, section 309 of act No. 2557, which provided as follows:

> "Contracts on behalf of the Insular Government with companies operating vessels engaged in the coastwise trade to secure the carriage of freight and passengers for the Government shall be executed by the Secretary of Commerce and Police, subject to such restrictions as may be prescribed by law; but *vessels engaged in the coastwise trade and vessels plying between Philippine ports shall continue to carry mail free*" (Rec., p. 6).

May 4, 1916, respondents served notice upon the Director of Posts, Manila, Philippine Islands, that on and after June 1, 1916, they would decline to carry mail matter unless paid for such service (Rec., p. 6). The Board of Public Utility Commissioners thereupon, upon the complaint of the Director of Posts, held a hearing, at which testimony was off red and both sides were heard, the steamship companies contending in their argument that the act in question was unconstitutional and invalid (Rec., pp. 7-40). The Board of Public Utility Commissioners rendered its decision to the effect that it had power only to enforce the law as it stood, namely, section 309 of act No. 2657, and ordered the respondents to comply with the provisions of said act and to carry the mails free (Rec., pp. 40-44). Respondents then petitioned the Supreme Court of the Philippine Islands, in accordance with the law and practice of that court, to require the Board of Public Utility Commissioners to certify to the court the record of all proceedings in said case (Rec., pp. 1-3). Such order was issued, and the proceedings were duly certified to the Supreme Court of the Philippine Islands (Rec., p. 5). The case was twice argued, and on January 23, 1918, the Supreme Court rendered its decision, holding that said section 309 of act No. 2657, requiring respondents to carry the mails free was, and is, "in direct contravention

of the provisions of the organic law of the Philippines, which prohibits the taking of private property for public use without just compensation," and therefore invalid (Rec., pp. 47-48).

This decision of the Supreme Court of the Philippine Islands is now before this court for review, but before discussing the law as therein laid down, we feel it is necessary to briefly refer to the statement of the case made in petitioner's brief.

On page 2, first paragraph, it is stated: "During the Spanish régime, and after the change of sovereignty, the respondents and other marine carriers operating vessels between Philippine ports carried mail without direct payment therefor (R., 70). No prior claim has been made that the Philippine Organic Act rendered this practice illegal." This is partly true and partly in error. As a fact, the mail has been carried without direct compensation. Likewise as a fact respondents, nor anyone else so far as we know, ever disputed the legality of free mail carriage under the Spanish law. But it does not appear that respondents have acquiesced in this requirement subsequent to the cession of the Islands to the United States and the enactment of the Philippine Organic Act. The organic act of course had no connection with the prior Spanish law or practice, but respondents have, during a period of many years, contended, and contend now, that after the change in sovereignty the organic act did render the practice in question illegal.

Also, on page 3 of petitioner's brief, the section of the legislation here in controversy is quoted, and at the end of the quotation there is added in parenthesis "(a mere codification of the antecedent law)." Assuming that this refers to the law under the sovereignty of the United States, as it must, we must respectfully submit that the statement, as a matter of fact or law, is erroneous. We say this, notwithstanding the peculiar phrasing of the present statute. There was no ante-

cedent law on this subject, except the prior Spanish law, which was abrogated and nullified by the organic act. Petitioner has made no showing of any antecedent law, and none exists.

This point is of considerable importance, inasmuch as petitioner's entire argument is founded more or less upon the assumption, first, that the present legislation is a codification of a prior law, and, second, that respondents have voluntarily acquiesced in such law and practice from the beginning of time until the institution of the present proceedings; both of which assumptions we deny, both absolutely and upon the present record.

In stating petitioner's "basic proposition," counsel says (page 4 of brief):

> "The respondents having applied for and accepted licenses authorizing them to operate vessels in the Philippine coastwise trade *subject to the law requiring them to carry mail without charge in consideration of privileges and benefits accorded them by the Government in granting them the right to engage in said business* have no cause for complaint regarding the conditions prescribed and obligations voluntarily assumed." (The italics are our own.)

This statement of petitioner's principal argument itself is erroneous, in that it assumes as a fact a matter which petitioner has not proved nor attempted to prove, and which respondents denied and still deny.

At the trial and hearing of this case petitioner offered no evidence, made no proof of any kind, and rested on section 309 of act No. 2657. Until the enactment of that legislation, no law of any kind was on the statute books, nor legally in force as common law or unwritten law, requiring respondents or other water carriers to transport the mails free, and petitioner has not cited in his brief any such law. (We of course refer to the period subsequent to the beginning of American

sovereignty.) Yet in his statement of the case, and particularly in his statement of petitioner's "basic proposition" (page 4 of petitioner's brief), counsel refers to this existing *law* prior to the enactment of the present legislation.

As to the matter of *practice* or custom, respondents have admitted that since some time before the change in sovereignty and until they served notice on the Director of Posts that further carriage would be refused unless proper and reasonable payment were made therefor, the mails have as a matter of fact been carried, but respondents expressly denied at the trial and hearing of this case (paragraph V of respondents' answer—Record, p. 10), placed evidence and the testimony of witnesses before the board and the Supreme Court (Record, pp. 28, 31-32, 34, 36, 38-39; see particularly testimony of C. C. Cohn, pp. 38-39), and here again expressly deny that they ever at any time subsequent to the enactment of the Philippine Organic Act under American sovereignty, voluntarily or in any way acceded to the *legality* of the requirement of free mail service, but on the contrary that they have expressly protested and continued to protest, by every means in their power, against such contention on the part of the Philippine Government.

Quoting from the testimony of Charles C. Cohn, who was general counsel for the Shipowners' Association (Record, pp. 38-39):

> "I am and I have been one of the attorneys for the Shipowners' Association, and the private attorney for the last eight years. I desire to say that the question of the free transportation of mails in the Philippine Islands is not new, but that it is a question that has been raised by adequate proceedings ever since the promulgation of Customs Circular No. 627. The first opportunity that offered itself to raise this question was when the Insular Collector of Customs threatened a ship's master, Captain Joaquin Villata, to cancel his license for not having notified a postmaster at a port of call of the change of the hour of departure of

his ship. Founded upon this incident, we succeeded in obtaining from the Supreme Court an injunction prohibiting the Insular Collector of Customs and the Director of Posts from interfering with the said captain in the enjoyment of his license, just because he had omitted complying with a duty imposed upon him by a law that we considered unconstitutional as set forth in the allegations of that injunction case. From the moment of the filing of the case, until the early part of this year, we prayed for a decision on the merits, though unsuccessfully, notwithstanding the diligence of the shipowners during the pendency of the case. At the beginning of this year the case was dismissed by agreement of both parties due to changes in the laws applicable, and in its stead different proceedings were instituted before the Board of Public Utility Commissioners which had been created while the case of Villata *versus* The Collector of Customs was still pending decision. And for the better presentation of the case and to facilitate the decision upon its merits, without hampering it with technical points, the later proceedings were also voluntarily dismissed, so as to bring up the present proceedings. The shipowners have, therefore, done everything possible, through their attorneys, to raise this question from the very beginning, and from the very start they never accepted this service without compensation. That is all.

"The Chairman: Who begun, or who instituted, that Bellota case?

"A. It was begun in the name of Joaquin Bellota by us who had been employed by the shipowners to defend the license of Bellota.

"Q. Can you state the year when that case was filed?

"A. With certainty, no sir; but I am sure that it was pending on a demurrer in the Supreme Court for several years.

"Q. Is that the only case filed and paid for by the Shipowners' Association?

"A. Yes, sir; in filing that case, care was taken to present the question in due form and with the least inconvenience to the parties, as the law providing for

> the transportation of mail is of much importance to the public, to the Government, and to the shipowners; the case was conducted in such a way as not to cause damage, first, to the government, as until the legislature should meet the service could not be submitted; then to the shipowners, because in case the free transportation of the mails should be compulsory, their refusal would give rise to a disorder of some proportions."

Petitioner at the trial and hearing of this case before the board, when it was proper to introduce evidence, did not attempt to prove any long-continued and accepted practice, or acquiescence on the part of respondents in any supposed law, but stated through its counsel that it had no evidence to offer, and rested on section 309 of act No. 2567 (Record, p. 20).

Respondents here have no desire to interpose technical objections to actual matters of fact upon which petitioner's argument is based, but in view of the circumstances cannot pass unchallenged these facts *assumed* in petitioner's brief which petitioner did not attempt to prove at the hearing. It is not fair to respondents that petitioner should introduce in argument and assume disputed facts, when respondents have never had a proper and legal opportunity to meet and contest such alleged facts, except by anticipation, and must do so now in argument before this court or else take the risk of having them likewise assumed by this court. Respondents deny, and have always denied, that there is any *legal authority* for the free mail service which they have been performing, and this contention has been the subject of long controversy and litigation. There has not been a line or word in the law of the Philippine Islands, written or unwritten, requiring free mail service, from the date of the Philippine Organic Act to the date when the present legislative act, here in question, was put in effect, and the actual performance of any such service has always been by sufferance and under protest.

Memorandum of Points.

The points upon which respondents rely and the authorities submitted in support thereof, are:

1. The specific act and legislation in question, resulting in the taking of respondents' property, is null and void and of no effect, under the provisions of the Philippine Organic Act of July 1, 1902, as amended, containing a bill of rights for the Philippine Islands, forbidding the taking of private property for public use without just compensation.

Act of Congress approved July 1, 1902 (32 Stat., 691).

Act of Congress approved Aug. 29, 1916 (39 Stat., 545), Sec. 3.

Kepner *vs.* United States, 195 U. S., 100.

Serra *vs.* Mortiga, 204 U. S., 470.

Carino *vs.* Insular Government, 212 U. S., 449.

Weems *vs.* United States, 217 U. S., 349.

Railroad Commission Cases, 116 U. S., 331.

Dow *vs.* Deidilmann, 125 U. S. 689.

Chicago & St. Paul Ry. *vs.* Minnesota, 134 U. S., 418, 458.

Reagan *vs.* Farmers Loan & Tr. Co., 154 U. S., 362.

Ex parte Gardner, 113 Pac., 1054.

State *vs.* M., K. & T. Ry. Co., 172 S. W., 35.

Lake Shore, etc., Ry. Co. *vs.* Smith, 173 U. S., 684.

Elliott on Railroads, sec. 672.

A., T. & S. F. Ry. Co. v. Campbell, 61 Kans., 439; 59 Pac., 1051; 48 L. A. R., 251.

A., T. & S. F. Ry. Co. *vs.* United States, 225 U. S., 640.

Great Northern Ry. Co. vs. United States, 236 Fed., 433.

Lake Sup. & Minn. R. R. *vs.* United States, 93 U. S., 442.

A., T. & S. F. R. R. *vs.* United States, 93 U. S., 442.
United States *vs.* Union Pac. R. R. Co., 249 U. S., 354.
Willcox *vs.* Consolidated Gas Co., 212 U. S., 19.
Sutton *vs.* State of New Jersey, 244 U. S., 258.

2. The act in question gains no support or validity from the Spanish laws and customs prior to the assumption of sovereignty by the United States and the enactment by Congress of the Philippine bill of rights.

President's Instructions to the Philippine Commission April 7, 1900.
Kepner *vs.* United States, 195 U. S., 100.
Weems *vs.* United States, 217 U. S., 349.
Tiaco *vs.* Forbes, 228 U. S., 549.

3. The legislation here in question is not aided by any alleged conduct or acquiescence on the part of respondents, nor are respondents foreclosed from contesting the invalidity of said legislation.

Interstate Consolidated Street Ry. Co. vs. Massachusetts, 207 U. S., 79.
Kansas City, M. & B. R. R. Co. *vs.* Stiles, 242 U. S., 111.
International & Great Northern Ry. Co. *vs.* Anderson County, 246 U. S., 424.

4. By reason of the act in question respondents are deprived of definite and unmistakable property rights, for which they receive no compensation whatever.

Transcript of Record, pp. 9-10, 21, 15-16, 20, 21-26, 27-30, 31-33, 34-35, 35-38.
Friend *vs.* United States, 30 Ct. Cl., 94.
Pumpelly *vs.* Green Bay Co., 13 Wall., 166.
Bridge Co. *vs.* Dix, 6 How., 507.
Peabody vs. United States, 43 Ct. Cl., 5.

Spring Valley Waterworks *vs.* San Francisco, 124 Fed., 574.

A., T. & S. F. Ry. Co. *vs.* Campbell, 61 Kans., 439; 59 Pac. 1051; 48 L. R. A., 251.

New York & Queens Gas Co. *vs.* McCall, 245 U. S., 345.

Puget Sound Traction Co. *vs.* Reynolds, 244 U. S., 574.

Willcox *vs.* Consolidated Gas Co., 212 U. S., 19.

Monongahela Nav. Co. *vs.* United States, 148 U. S., 312, 327.

Charles River Bridge Co. *vs.* Warren Bridge, 11 Pet., 420, 571.

Isom *vs.* Miss. Cent. Railroad, 36 Miss., 300.

In re Rugheimer, 36 Fed., 376.

District of Columbia *vs.* Prospect Hill Cemetery, 5 App. D. C., 497.

Md. & W. Ry. Co. *vs.* Hiller, 8 App. D. C., 289.

ARGUMENT.

I.

Section 309 of Act No. 2657 of the Philippine Legislature, re-enacted as section 568 of Act 2711 (the Administrative Code), is null and void and of no effect, under the provisions of the Philippine Organic Act of July 1, 1902, as amended, containing a Bill of Rights for the Philippine Islands, forbidding the taking of private property for public use without just compensation.

The single question at issue in this case is the validity of that part of section 309 of the Administrative Code of the Philippine Islands (sec. 568 of the Administrative Code, act No. 2711), which provides that "vessels engaged in the coastwise trade and vessels plying between Philippine ports

shall continue to carry mail free." The validity of said act of legislation depends upon the organic law or "constitution" of the Philippine Islands; in other words, the act of Congress approved July 1, 1902 (32 Stat., 691), establishing a government for the Islands, as amended by the subsequent acts of February 6, 1905 (33 Stat., 689), and August 29, 1916 (39 Stat., 545).

Both the original act of July 1, 1902, and the subsequent act of August 29, 1916, contain a bill of rights (section 5 of the former act, section 3 of the latter) similar to the bill of rights in the Constitution of the United States. Included therein is the following paragraph:

> "No law shall be enacted in said Islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws. Private property shall not be taken for public use without just compensation."

The individual rights guaranteed by said bill of rights, including the quoted paragraph, were taken almost *verbatim* from the Constitution of the United States, and, in accordance with established rules of construction, must be given the same interpretation and application as are given to the similar clauses in the Constitution.

Kepner *vs.* The United States, 195 U. S. 100.
Serra *vs.* Mortiga, 204 U. S., 470.
Carino *vs.* Insular Government, 212 U. S., 449.
Weems *vs.* The United States, 217 U. S., 349.

The first and last of the cases cited, in addition to supporting the proposition above stated, are so similar to the present case, both in the close analogy of the circumstances and the identity of the principle involved, that we deem a more extended reference thereto proper and pertinent to the present consideration.

In *Kepner vs. The United States*, the defendant, a lawyer in the city of Manila, was charged with the crime of embezzlement (estafa). He was tried in November, 1901, in the court of first instance, without a jury, and acquitted, it being the judgment of the court that he was not guilty of the crime charged. The prosecution thereupon appealed the case to the Philippine Supreme Court, and that court reversed the trial court, found the defendant guilty, and sentenced him to a term of imprisonment and other punishment. The final decision in the case, finding the defendant guilty and imposing the sentence, was rendered December 3, 1902. Before the final rendition of judgment against the accused, the act of Congress of July 1, 1902, had become law in the Philippine Islands, containing a bill of rights with a provision, among others, that "no person for the same offense shall be twice put in jeopardy of punishment." The case was brought to the Supreme Court of the United States by writ of error, the error assigned being that the accused had been put in jeopardy a second time by the appellate proceedings to the Philippine Supreme Court after he had been acquitted by the trial court, in violation of the law of Congress and the Constitution of the United States.

On the part of the Government it was contended (and this contention is of particular moment when compared with the contentions of petitioner herein) that that part of the law or "bill of rights" under immediate consideration, which provided that no person for the same offense should be twice put in jeopardy, must be construed in view of the system of laws prevailing in the Islands before the same were ceded to the United States, and that the purpose of Congress was to make effectual the jurisprudence of the islands as known and established before American occupation, and that the provision against double jeopardy must be read in the light of the understanding of that expression in the civil law, or rather the Spanish law as it was then in force. The Spanish law, previously administered in the Islands, recognized the

doctrine of double jeopardy, but in doing so did not regard that a person was in jeopardy in the legal sense until there had been a final judgment in the court of last resort, the trial being regarded as one continuous proceeding up until final judgment of the last appellate court, the protection given being against a second trial after the first trial had been concluded in due form of law.

Mr. Justice Day, delivering the opinion of the court, referred to the evident intention of Congress, in enacting a Philippine bill of rights, "to carry some at least of the essential principles of American constitutional jurisprudence to these islands and to engraft them upon the law of this people, newly subject to our jurisdiction," and quoted at length from the instructions of the President to the Philippine Commission, partly as follows:

> "At the same time the commission should bear in mind, and the people of the Islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. It is evident that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent. Upon every division and branch of the government of the Philippines, therefore, must be imposed these invioiable rules:
>
> " 'That no person shall be deprived of life, liberty or property without due process of law; that private

property shall not be taken for public use without just compensation.'

* * * * * * *

" 'That no person shall be put twice in jeopardy for the same offence.' "

The opinion of the court continues:

"These words are not strange to the American lawyer or student of constitutional history. They are the familiar language of the bill of rights, slightly changed in form, but not in substance, as found in the first nine amendments to the Constitution of the United States, with the omission of the provision preserving the right to trial by jury and the right of the people to bear arms, and adding the prohibition of the Thirteenth Amendment against slavery or involuntary servitude except as a punishment for crime, and that of Art. 1, Sec. 9, to the passage of bills of attainder and *ex post facto* laws. These principles were not taken from the Spanish law; they were carefully collated from our own Constitution, and embody almost *verbatim* the safeguards of that instrument for the protection of life and liberty.

"When Congress came to pass the act of July 1, 1902, it enacted, almost in the language of the President's instructions, the bill of rights of our Constitution. In view of the expressed declaration of the President, followed by the action of Congress, both adopting, with little alteration, the provisions of the bill of rights, there would seem to be no room for argument that in this form it was intended to carry to the Philippine Islands those principles of our Government which the President declared to be established as rules of law for the maintenance of individual freedom, at the same time expressing regret that the inhabitants of the Islands had not theretofore enjoyed their benefit.

"How can it be successfully maintained that these expressions of fundamental rights, which have been the subject of frequent adjudication in the courts of

this country, and the maintenance of which has been ever deemed essential to our Government, could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken?

"It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. *The Abbotsford*, 98 U. S., 440.

"It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the Islands without Congressional legislation. The power of Congress to make rules and regulations for territory incorporated in or owned by the United States is settled by an unbroken line of decisions of this court and is no longer open to question. *American Ins. Co. vs. Canter*, 1 Pet., 511; *Murphy vs. Ramsey*, 114 U. S., 15; *Mormon Church vs. United States*, 136 U. S., 1, 42, 43; *Downes vs. Bidwell*, 182 U. S., 244; *Hawaii vs. Mankichi*, 190 U. S., 197. This case does not call for a discussion of the limitations of such power, nor require determination of the question whether the jeopardy clause became the law of the Islands after the ratification of the treaty without congressional action, as the act of Congress made it the law of these possession when the accused was tried and convicted."

The court then examined the question of former jeopardy in the light of the Constitution and the common law, and reaching the conclusion that the defendant had been twice put in jeopardy, reversed the lower court and ordered the defendant discharged.

Weems vs. The United States came to this court upon a writ of error to review a judgment of the Supreme Court of the Philippine Islands affirming the conviction of Weems for falsifying a "public and official document." The sentence imposed upon him was a fine of 4,000 pesos, and *cadena temporal* of over twelve years with accessories, such acces-

sories including the carrying of chains, deprivation of civil rights during imprisonment, and thereafter perpetual disqualification to enjoy political rights, hold office, etc., and subjection besides to surveillance. This was the minimum sentence required by section 56 of the Philippine penal code.

The material assignment of error was that the sentence violated that provision of the Philippine bill of rights which forbade the infliction of cruel and unusual punishment.

Quoting from the opinion of the court (pp. 366-367):

> "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.
>
> "Is this also a precept of the fundamental law? We say fundamental law, for the provision of the Philippine bill of rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning. This was decided in *Kepner vs. United States*, 195 U. S., 100, 122; and *Serra vs. Mortiga*, 204 U. S., 470."

The court considered at length the nature and details of the sentence, and applying the doctrine of the *Kepner case, supra*, interpreting the provision of the Philippine bill of rights in the same manner as it would the similar provision of the Eighth Amendment to the Federal Constitution, held the offending statute of the Philippine Legislature to be invalid and void.

It is apparent that the provisions of the Philippine bill of rights, provided by the acts of Congress, constitute limitations upon the entire powers of the Philippine Government, with the same effect and restrictions as the similar provisions in the Constitution of the United States have upon the Government of the United States.

The act complained of in the present case is that requiring respondents to perform a certain service, to wit, the carrying of the mails, free of charge for the Philippine Government, a service which we shall show is one entailing great expense upon respondents and a taking of its property without compensation. The authority upon which respondents deny the validity of that act is the provision of the Philippine bill of rights (sec. 3, act of August 29, 1916, superseding sec. 5, act of July 1, 1902), which reads:

> "No law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws. *Private property shall not be taken for public use without just compensation.*"

This clause repeats almost verbatim the similar provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The present case is not one in which the taking complained of can be justified on the ground that it is a regulation of a public carrier. We could not question in the slightest degree the established doctrine that the Congress of the United States in interstate commerce, and the several States in intrastate commerce, have the absolute right to regulate and control the services performed by public carriers and fix maximum rates to be charged by such carriers. It is no doubt true that this regulation has been carried in many cases very close to the line of demarcation between what is legal and what is not, but this court has always adhered to the limitation that the rates so fixed by the regulatory power must be such as will afford a reasonable compensation to the carrier for the services rendered. In the words of Chief Justice Waite of this court, "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot re-

quire a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

Railroad Commission Cases, 116 U. S., 331.

See also Dow *vs.* Deidilmann, 125 U. S., 689.

Chicago & St. P. Ry. *vs.* Minnesota, 134 U. S., 418, 458.

Reagan *vs.* Farmers Loan & Trust Co., 154 U. S., 362.

In the latter case, the court said (at p. 399), after referring to the above-cited cases and others:

> "These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees the forms of law and the machinery of government, with all their reach and

> power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

Several States have sought at times to pass laws requiring railroads to carry State troops within the State at reduced rates; for instance, the acts of the legislatures of Missouri and Kansas requiring railroads to carry the State troops at a rate of one cent per mile, there being a uniform and maximum rate already fixed by law to the general public. Both of those statutes were declared unconstitutional and void, as taking private property without due process of law and without just compensation.

Ex Parte Gardner (Kansas), 113 Pac., 1054.
State *vs.* M. K. & T. Ry. Co. (Missouri), 172 S. W., 35.

In the Kansas case the court said (page 1056):

> "Viewed from this standpoint the statute selects railroad companies from among other common carriers, corporations, and property owners of the State, placing them in a class by themselves, and imposes upon them a specific burden, supposedly for the public welfare. In many instances this may be done, but it cannot be done where the exaction is made to defray an expense having no more relation to the business of railroading than it has to any other business enterprise conducted within the State."

An effort was likewise made to justify the statute on the ground that it was merely an exercise of the military power of the State to preserve peace, suppress riots, and repel invasion. The court, however, says that such a power can be exercised only in cases of actual emergency, and that each case must depend upon its own circumstances; that it is only the emergency which gives the right to impress private property, and the emergency must be shown to exist before the taking can be justified. The emergency, it is said, must be

such that the taking cannot be made to wait upon due process of law. The court then comments as follows, page 1057:

> "When, however, the Government is in no extremity in fact which requires the suspension in whole or in part of the civil laws, contributions to its support cannot be levied upon private persons or corporations except pursuant to laws which prescribe the occasions, modes, conditions, and agencies, for the appropriation, and shall bear equally upon all those who are similarly situated."
>
> See also *Lake Shore, etc., Railroad Co. vs. Smith*, 173 U. S., 684.

It is quite evident from the authorities and cases touching upon this question that despite the acknowledged power of the government, whether the Federal Government, a State Government, or the Philippine Government, to regulate the compensation and service to be performed by carriers and other public service enterprises, the authority of none of those governments extends to the imposition of inadequate terms of compensation, and *a fortiori, can never reach the point of requiring free service*. This is forbidden to the Federal Government by the Fifth Amendment to the Constitution, to the States by the Fourteenth Amendment, and to the Philippine Government by section 3 of the act of August 29, 1916.

See Elliott on Railroads, section 672, where the author says:

> "It is quite clear that the legislature cannot compel a railroad company to render services without compensation. This is decided in the Railroad Commission cases and other cases referred to in the preceding section. The conclusion we affirm rests on elementary principles of constitutional law and is strongly fortified by decisions of analogous cases."

See also Atchison, Topeka & Santa Fe Ry. Co. *vs.* Campbell (61 Kansas, 439; 59 Pac., 1051; 48 L. R. A., 251), in

which it was held that a statute requiring railroad companies to furnish free transportation to shippers of live-stock, without compensation therefor, is void as a deprivation of property without due process of law, and as a denial of the equal protection of the laws.

Counsel for petitioner cites *Atchison, Topeka & Santa Fe Ry. Co. vs. The United States* (225 U. S., 640), in support of his contention for the power of the Government to impose upon carriers of the mails whatsoever conditions and terms the officers of the Government may deem proper, as in the present instance, carriage without compensation of any kind—quoting from the opinion in said case: "For, public policy requires that the mail should be carried subject to postal regulations, and that the Department, and not the railroad should, in the absence of a contract, determine what was needed and under what conditions it should be performed." But this case (A., T. & S. F. Ry. Co. *vs.* The United States) involved rules and regulations of the Postmaster General relative to the *method* of carrying the mails, the size of cars, etc., to certain of which regulations the carrier objected, and the suit was brought by the carrier to recover certain amounts which it claimed were due it for services rendered, in view of the objections it had made to the regulations in question. The substance of the decision of this court was that public policy requires that the mail be carried subject to postal regulations and that, in the absence of special contract, it is for the Post Office Department, and not the railroad, to establish such regulations as to service. There was no question as to compensation or no compensation. The following quotation from the opinion discloses that the case is not only not authority for any of the positions taken by petitioner, but, if applicable at all, authority to the contrary:

> "The railroad, however, was not bound to furnish 'half lines' nor to accept the terms named by the Postmaster General. For Congress had not legislated

so as to require compulsory service, at adequate compensation to be judicially determined or in a method provided by statute. And as the plaintiff's road between Chicago and Kansas City had not been aided by a land grant, it was, under existing law, not obliged to carry the mails when tendered, nor to supply R. P. O. cars when demanded. *Eastern Railroad vs. United States*, 129 U. S., 391, 395-396; *United States vs. Alabama G. S. Railroad*, 142 U. S., 615. It may have been impracticable to furnish long cars one way and short ones the other. But there was in that fact no hardship imposed by law. The company could have protected itself against onerous terms, or inadequate compensation, by refusing to supply the facilities on the conditions named by the Department. But if, instead of availing itself of that right, it preferred to furnish 60-foot cars after having been informed that the Department only needed and would only pay for those 50 feet in length, the company cannot recover for more than the Department ordered; nor under the statute can it demand compensation for full lines, when the Postmaster General had established 'half lines' consisting of cars of one length going and of another returning on the route between Chicago and Kansas City."

The case of *Great Northern Ry. Co. vs. The United States* (236 Fed., 433), cited in counsel's brief, has likewise no application here. It involved the right of the Postmaster General to impose fines for violation of certain postal regulations, and the test of the disputed right was simply the terms of the contract between the United States and the railroad, which contract was considered to be made up of the various statutes, regulations, and written agreements between the Government and the railroad. The court referred in the opinion to the well-known rule that considerable weight is to be given, in passing upon a contract, to the practical interpretation which has been placed thereon by the parties.

Counsel also refers (p. 6 of brief) to the "Land Grant" acts, under which certain railroads in the United States are

made public highways for the use of the Government, free from tolls or charge for the transportation of its property or troops. The citation is made effective by the assumption that these acts obligate the railroads in question to carry the mails free of charge if the Government so wills it. Quoting from counsel's brief: "These companies have been allowed some compensation for carrying mail—merely carrying at a reduced rate—but there is no difference in principle between free and reduced-rate service, and they could be required to carry mail free under the provisions of the incorporating acts." This is of course a misconception on the part of counsel as to the legal effect of the "Land Grant" acts. It was decided by this court so long ago as 1876, in *Lake Superior & Mississippi R. R. vs. The United States,* and *Atchison, Topeka & Santa Fe R. R. vs. The United States* (93 U. S., 442), that the provisions in question, contained in the "Land Grant" acts, secured to the Government the free use of the road, but did not entitle it to have troops or property transported over the road by the railroad company free of charge for transporting the same. In other words, the roadbed and right of way was open to the Government without charge, but the service of transportation could only be required by payment of just compensation to be determined if necessary by the courts. The just compensation to which the railroads were thus entitled was subsequently determined, at first by actions in the Court of Claims and later by agreement, to be fifty per centum of the rates charged the public; and this constitutes a right of property which cannot under the provisions of the Federal Constitution be infringed.

See reference to these cases in the opinion of this court in *United States vs. Union Pacific R. R. Co.* (249 U. S., 354-355).

The "Land Grant" cases are authority in support of our argument as to the invalidity and illegality of the act of legislation here in question, rather than the contrary.

The cases of *Willcox vs. Consolidated Gas Company* (212

U. S., 19), and *Sutton vs. State* (244 U. S., 258), cited by counsel for petitioner, require some mention.

In the *Consolidated Gas Company* case the complainant filed its bill to enjoin the enforcement of certain acts of the legislature of New York, as well as of an order made by the Gas Commission relative to rates for gas in New York city. These acts, in their principal provisions, limited the price of gas sold to the city of New York to a sum not to exceed 75 cents per thousand cubic feet, and the price of gas in the boroughs of Manhattan and the Bronx, to other consumers than the city of New York, to 80 cents per thousand cubic feet. The order of the Gas Commission was in accordance with these acts. The primary ground for the relief asked in the bill was the alleged unconstitutionality of the acts and the order, because the rates fixed were so low as to be confiscatory, and the case was fought and decided on that primary issue, this court holding that, on the whole, sufficient showing had not been made that the rates were confiscatory. Additional objection was also made that there was an illegal discrimination as between the city and the consumers individually, inasmuch as the city was given a 75-cent rate and the public an 80-cent rate. Upon this additional objection this court held that under the circumstances of the case there was no illegal discrimination or one of which the gas company could reasonably complain. It is upon the latter point, of course, that the case is here cited as authority in support of petitioner's present contentions for the validity of the act of the Philippine Legislature.

The essential and fundamental difference between *Willcox vs. Consolidated Gas Co.* and the present case is that there the constitutional objection was to an alleged illegal *discrimination* (by reason of slightly different rates) as between the city and the consumers individually, which this court held was a matter with which the gas company was not concerned, so long as it received a fair return on its whole investment. In this case, on the other hand, respondents have contended

that the act of the Philippine Legislature in question, regardless of any consideration of discrimination, in and of itself takes respondents' property without compensation, by requiring an extensive and increasing service without any payment therefor. The difference between the two cases is fundamental and is best disclosed by a full consideration of the separate facts in each.

In *Sutton vs. State of New Jersey* (244 U. S., 258) the act in question was a statute of New Jersey requiring street railway companies to grant free transportation to police officers while engaged in the performance of their public duties. The act was upheld upon the broad ground of the police power of the State to enact legislation for the protection and welfare of the public. There is no analogy between that case and the present one; the principle of the police power of the State, under the most liberal interpretation, could not be invoked in connection with the facts of the present case.

II.

The act of the Philippine Legislature, requiring respondents to carry the mails free, gains no support or validity from the Spanish laws and customs prior to the assumption of sovereignty by the United States and the enactment of the Philippine bill of rights.

It has been contended with earnestness by petitioner (pp. 7-16 of counsel's brief), and by Justice Carson of the Philippine Supreme Court in his dissenting opinion when the case was before that court, that under the law in force in the Islands during the sovereignty of Spain, merchant vessels engaged in the coastwise trade were required to carry the mails free, a custom which had been in existence "from time immemorial" and which was based, so far as justifica-

tion of law is concerned, upon Spanish decrees running through half a century. We do not go into detail with respect to these Spanish decrees and customs nor discuss them at length. Such examination is not necessary here, because we concede that such was the law and custom under the sovereignty of Spain. Petitioner, however, contends that this custom was carried over into the American régime and continued in force, that it became a part of the new law under the American sovereignty by reason of the rule that territory acquired by the United States retains such of its old laws and customs as are not inconsistent with the new system nor specifically repealed, and that by reason of such circumstances the Philippine bill of rights is not applicable or must be read in the light of the Spanish law and customs referred to.

In reply respondents insist that no matter what was the law of Spain prior to the American occupation, and no matter what customs were continued and followed during the earliest period of that occupation, the enactment of the Philippine bill of rights swept away by one stroke each and every law or decree or custom which came within the prohibition of that bill of rights and prevented by the force of its law any further infringement or impairment of those rights. That was the very purpose, the single purpose, of that bill of rights—to bring to the people of the Philippines a new system of government different from that under which they had been living, a system under which the life, liberty, and property of every citizen was to be protected equally. President McKinley, in his instructions to the Philippine Commission, expressly stated:

> "At the same time the commission should bear in mind, and the people of the Islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of in-

dividual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. It is evident that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent. Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules:

" 'That no person shall be deprived of life, liberty or property without due process of law; that private property shall not be taken for public use without just compensation.' "

"Private property shall not be taken for public use without just compensation." Can it be supposed that Congress put that clause in a bill of rights for the Philippine people, intending it to be qualified by an implied proviso that if a thus forbidden practice had existed under the Spanish rule that circumstance was sufficient to override the new bill of rights?

We concede it to be settled that the laws of a former sovereignty continue in force in territory acquired by the United States, except so far as inconsistent with or repealed by the laws of the new sovereignty, the rule applying with particular force to laws affecting commercial transactions, personal property rights, and domestic relations. But this does not mean—in fact, the limitation expressed in the rule itself excludes such meaning—that a statute or law enacted by the new sovereign is to be nullified by the existence of a prior law or practice or custom under the former sovereign. This

is exactly the present case. The law of Spain required the shipowners to carry the mail free; this was lawful under the system of that kingdom, which has not the same constitutional restrictions as we have in our bill of rights. But the *sovereignty changed*, and after the change the new sovereign enacted a law, a bill of rights, providing among other things that "private property shall not be taken * * *" etc. Plainly and beyond any question this restriction on the powers of the local government cannot be narrowed or confined by the existence of any prior Spanish law or custom whatever.

The Spanish law and decrees are totally irrelevant in the consideration of the present legislation, or rather the consideration of the act itself sought to be enforced and justified by the legislation. As this court has said, it is not the legislation which takes private property without compensation, but the act sought to be done in pursuance of the legislation. If the Constitution (or here the bill of rights) prohibits the act, it makes no difference how ancient the purported authorization may be.

Directly in point upon this question of relevancy of the prior Spanish law, we cite *Kepner vs. United States* (195 U. S., 100) and *Weems vs. United States* (217 U. S., 349), both hereinbefore referred to, *supra*, p. 15.

The *Kepner* case involved the clause in the Philippine bill of rights providing that no person should be twice put in jeopardy for the same offense. The Government contended that this clause should be read and interpreted in the light of the prior Spanish law, but this contention was expressly rejected by this court. See discussion of this case, *supra*, p. 16.

The *Weems* case involved that clause in the bill of rights forbidding the imposition of cruel and unusual punishments, and the same contention was made as in the *Kepner* case, as to the interpretation of the bill of rights in the light of the prior Spanish law. This court again rejected that conten-

tion, holding that the Philippine bill of rights must be construed in the light of the Constitution of the United States and the common law.

These decisions we deem to be conclusive upon the question stated. *Tiaco vs. Forbes* (228 U. S., 549), cited by *counsel for petitioner* on this feature of the case, is not inconsistent, as in that case this court simply held that Congress not being prevented by the Federal Constitution from deporting aliens, the Philippine government cannot be prevented from so doing by the bill of rights incorporated in the act of July 1, 1902, thus interpreting the Philippine Constitution from the same standpoint as it would the Federal Constitution, and following *Kepner vs. United States* and *Weems vs. United States, supra.*

III.

The legislation here in question is not aided by any alleged conduct or acquiescence on the part of respondents, nor are respondents foreclosed from contesting the invalidity of said legislation.

Counsel for petitioner also contends, in support of the validity of this legislation and the error of the Supreme Court of the Philippine Islands in holding it invalid, that under certain of the decisions of this court respondents are foreclosed from contesting the legislation or seeking to have it declared by the courts to be invalid. The substance of the argument is that a practice exists in the Philippine Islands under which free carriage of the mail is undertaken by marine carriers as a part consideration for their coastwise licenses; that respondents voluntarily engaged in the coastwise trade with knowledge of this alleged practice and have acquiesced in it; and that having thus applied for and accepted licenses authorizing them to operate vessels in the

Philippine coastwise trade they have no cause for complaint regarding the conditions prescribed.

At the outset and in direct answer to this argument advanced on the part of petitioner, we again call attention, as we have before, to the fact that the foregoing recital is one largely of facts—that a practice exists, that respondents had knowledge, that respondents' actions were thus, that licenses were applied for and issued, that respondents have acquiesced, and so on. Yet petitioner has not proved a single one of these facts, and has not made any record upon which the questions suggested can even be fairly considered. On the contrary, we believe the record shows clearly that some of these statements and assumptions are in error, notably the existence of any *lawful* practice, and the attitude of respondents toward the existence of an actual practice (that is, whether of protest or acquiescence).

Passing the question of the substance or merits of any such consideration, we find that the record discloses nothing as to the nature of the licenses originally granted respondents, their acceptance of any institution of American Government and laws, nor as to any other of the facts alleged and assumed by counsel. Counsel for the Government declined at the trial of the case to introduce evidence and elected to stand upon the terms and legal effect of the act in question; he cannot now in fairness argue from alleged facts the proof of which he was not willing to assume.

In support of the argument referred to, counsel has cited certain cases decided by this court in connection with corporations whose charters or franchises were granted subject to certain reservations, that is, subject to the provisions of existing law or existing statutes, and this court has held and established the principle that under such circumstances the corporation is foreclosed from attacking the statute or law upon constitutional grounds, its provisions being as much a part of the corporation's charter or the grant of incorporation as though written therein.

Interstate Consolidated Street Ry. Co. vs. Massachusetts (207 U. S., 79) involved the constitutionality of a statute of Massachusetts requiring the transportation of school children by certain railways at half fare. The act in question was enacted in 1900. The incorporation of the street railway company was dated March 15, 1901, and by the terms of the act of incorporation said company was made "subject to all the duties, liabilities and restrictions set forth in all general laws now or hereafter in force relating to street railway companies, except * * *" etc. The decision of this court was stated by Mr. Justice Holmes: "A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter, and confines itself to that ground."

In *Kansas City, Memphis & Birmingham R. R. Co. vs. Stiles* (242 U. S., 111), the facts were that three separate corporations, operating railways in Alabama, Tennessee, and Mississippi, respectively, consolidated themselves under the laws of each of those States. The consolidated company succeeded to all the property of the constituents and issued its shares in lieu of theirs. As construed by the Supreme Court of Alabama, the law of Alabama, under which the consolidation was there effected, constituted the new corporation a domestic corporation of that State. The Alabama act of incorporation also contained the express provision that the company should in all respects be subject to the laws of Alabama as a domestic corporation. At the time of the incorporation, a State statute was in effect imposing a franchise tax based upon entire paid-up capitalization. This court held: "The railroads comprising this consolidation entered upon it with the Alabama statute before them, and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the State of Alabama."

International & Great Northern Ry. Co. vs. Anderson County (246 U. S., 424) involved an act of the Texas Legislature requiring in substance that every railroad company chartered by the State or owning or operating a line within the State should permanently maintain its general offices at the place named in its charter. The railroad corporation in question received its charter while the foregoing act was on the statute books. This court held, on the point for which the case is here cited, that where a corporation, organized under general laws subject to provisions and limitations imposed by law, while another act prohibited changing locations of railroad offices and shops in certain cases, purchased under proceedings foreclosing a mortgage—that whether or not the prohibition would have been constitutional as applied to the company's predecessors, it was a condition of its incorporation of which it could not complain.

The foregoing decisions we deem not applicable to the present case at bar—*first*, because there had been no existing statute or law prior to the act of the Philippine Legislature here in question, which was made effective March 1, 1916, and respondents have been operating their steamship lines over a period of twenty years and more; *second*, because nothing has been proven as to the terms of any charters granted respondents, nor when granted, nor as to the terms or dates of licenses issued; and *third*, because it appears affirmatively from the record that only one of the four respondents herein is a corporation, Compañia General de Tabacos de Filipinas, whereas Ynchausti & Co., J. M. Poizat & Co., and Fernandez Hermanos are each respectively commercial partnerships (Record, pp. 1-2), and for that reason, if not for any other, outside of the ruling principle in the three cases above cited.

IV.

By reason of the act in question respondents are deprived of definite and unmistakable property rights, for which they receive no compensation whatever.

The legislation requiring respondents to "continue to carry mail free" between Philippine ports, and the acts of the Director of Posts and Board of Public Utility Commissioners in pursuance thereof, being direct and positive in its effect upon respondents' property and rights, it would seem to be hardly necessary to contend or argue that respondents are thus deprived of a certain property right quite definite and unmistakable. However, throughout the argument and briefs filed by petitioner, both in its presentation of this case to the Supreme Court of the Philippine Islands and to this court, and also in the dissenting opinion filed by Mr. Justice Carson of the Philippine Supreme Court, there are constant statements and casual arguments to the effect that respondents are not being deprived of any property right, and that even if a technical taking of a legal right might be present, in any event it is of no value and respondents receive ample compensation in an indirect way.

Beginning with the last paragraph on page 31, through to page 38, petitioner's brief filed herein is devoted to a considerable argument along this line. Counsel states (p. 32): "These respondents have failed to show that the law complained of has made their business unprofitable or has operated to deprive them of any right whatever." Counsel also quotes at length from the dissenting opinion herein, filed by Mr. Justice Carson, whose reasoning and arguments are to the same effect, viz., that respondents have not been and are not being deprived of any property right of value or such as is protected by the bill of rights.

The fact that such a contention appears at all renders it necessary that some showing be made that property rights

of value are being taken from respondents without compensation.

At the outset we refer to the answer filed by respondents with the Board of Public Utility Commissioners, containing certain statements of fact, all of which were admitted by counsel for the board. Quoting from the record of said hearing:

> "Mr. Cohn: The respondents have filed an answer to the complaint filed by the Director of Posts, stating several facts with the object of showing that the service required by the Government from the respondents is very considerable, so that this question may not be decided in the courts, under the rule of *minimus non curat lex*. These facts are contained in paragraphs 2, 3, 4, and 5 of the answer, and unless the petitioner is ready to admit these averments as true, I beg the privilege of presenting witnesses to prove said allegations.
>
> "The Chairman (to Mr. Gerkin): The answer in the record contains some allegations in paragraphs 2, 3, 4, and 5; can you come to an agreement with respondents regarding those allegations?
>
> "Mr. Gerkin: I do not object to the facts contained in these paragraphs; however, there are some conclusions of law which we would not accept. The principal fact to the effect that there is no remuneration paid, that no provision is made for whatever kind of remuneration—that we admit."

We accordingly assume that the well-pleaded facts set forth in said paragraphs 2, 3, 4 and 5, are admitted and have the same effect as though demurred to. Those paragraphs contain the essential facts upon which respondents rely, and are as follows:

II.

> "That said defendants are now, and for some time last past have been, required and compelled by the Director of Posts of the Philippine Islands and by the

Collector of Customs of said lands, under threat of the temporary or permanent disqualification of the masters of said vessels, and otherwise, to render and perform, without payment, compensation, or reward thereof, certain arduous and costly services, and to wholly pay and defray the cost and expense thereof, namely:

"(*a*) The carriage of all mails tendered for transportation in a safe and secure manner and free from injury by water or otherwise between said ports of the Philippine Islands.

"(*b*) The giving of prompt advance notice of the intended sailing of said vessels to the postmaster at each port of departure in ample time to permit the making up of mails for dispatch.

"(*c*) The communication to such postmasters of any changes in the sailings of such vessels.

"(*d*) The delivery of all mails so carried by such vessels at ports of call on shore or on a wharf immediately after arrival and prior to discharge or lading of any cargo, and the delivery thereof from shore or wharf to such vessels just before the vessels' sailing time.

"(*e*) The maintenance on said vessels of lock boxes to receive letters, papers, or other mail matter delivered on board after the mails have been closed at the post office for that particular voyage and the delivery of such mail matter, so deposited on board, to the postmaster at a port of call of such vessels.

III.

"That during the times herein mentioned there has been instituted and inaugurated in the Philippine Islands, and there is now in full operation, a system of parcels posts whereby there is included in the mail matter of the Philippine Islands, in addition to the correspondence and printed matter therein embraced, Sundry and diverse merchandise of important and in-

creasing quantity and bulk, and consisting in part of articles similar to those which the said vessels have heretofore carried and still carry as freight for hire.

"That by reason of the free carriage of the mails, so required and compelled as aforesaid, the defendants have been and are required to lose and sacrifice unto such purpose a large and appreciable portion of the carrying space and capacity of such vessels which would otherwise be available for the carriage of freight for hire, and have furthermore been compelled to aid and assist, by free and gratuitous services, in an effective competition with its own business of common carrier.

IV.

"That at various and many of the ports of call of the vessels of said defendants, the necessary and proper anchorage of said vessels is situated at a considerable distance from the post office at such port and the means of communication and of travel between said anchorage and said post office are scarce, slow, costly, and grossly inadequate.

"That the said defendants have been, and now are, subjected to repeated and grave annoyances, trouble and expense, and the vessels of said defendants have been and now are greatly hindered, hampered, and interfered with in the prompt dispatch thereof, by reason of the facts aforesaid and by the requirement to communicate in advance the intended sailing hour of said vessels, or any change thereof and to deliver certain mails at the shore or wharf before unlading the cargoes of said vessels, and to deliver certain mail matter at the post offices of said ports of call, all to the grave loss and injury of these defendants.

V.

"That the defendants have not, nor has either nor any of them, consented, agreed, or stipulated that the said vessels of defendants or any of them shall per-

> form the free and gratuitous services hereinabove mentioned and referred to; but the said services have been and are being performed by said defendants, at the sole and exclusive cost and expense of the said defendants, under duress and under due protest by said defendants and each of them."

The testimony taken at the hearing before the board also shows clearly that the free service required by the act is extensive and of great value to the Government and the public. Mr. Masters, Assistant Director of Posts, testified that on the whole the volume of mail matter carried by the inter-island steamers (respondents) was increasing; that about 81,000 bags were received by the Manila office and dispatched to outside offices in 1915; that the dispatches to Cebu and Iloilo had sometimes reached 100 bags by one steamer; that such mails include, in addition to letters, newspapers, and printed matter, all classes of merchandise allowed by the parcel post law and regulations; that money in currency or coin is shipped in the domestic mail service (Rec., pp. 15-16).

Mr. Masters further testified, in response to questions as to the arrangements between the Philippine Government and the Manila Railroad Company for transporting mail by rail, that the government paid for that service a minimum rate of 52.15 pesos per kilometer per annum, and that the annual expenditure made by the Government for that service was about 90,000 pesos; that the volume of service performed by the inter-island steamers was greater and more extensive than that performed by the railroad (Rec., p. 17). On cross-examination he further testified that the rates and compensation he had stated were paid the Manila railroad as compensation for carrying the mail, were also paid the other railroads in the Islands (Rec., p. 20).

José Villavicencio, a mariner and captain of the Steamer Romulus, which carried mail to various ports in the islands,

testified generally as to the conditions with respect to receiving and delivering the mail at the ports at which his vessel called; how the schedules of sailings had to be adjusted to meet the requirements of the postmasters; and the difficulties of anchoring and sending in boats to get the mail (Rec., pp. 21-26).

Pedro Claparols, manager of the shipping department of the Compania General de Tabacos de Filipinas, testified to the incidental expense his company was put to in connection with delivering the mail at various ports; that the company had several times been held responsible for mail lost in transit; that money in coin and bullion was often sent by mail; that his company had been carrying the mail free for some years under protest, and that it was a party to certain litigation which had been pending in the Supreme Court looking toward the abolition of the compulsion to carry mails without charge (Rec., pp. 27-30).

José F. Fernandez, a member of the firm of Fernandez Hermanos, respondents, testified to the same effect as Mr. Claparols, also stating that his firm had not at any time consented voluntarily to transport the Philippine mail free of charge (Rec., pp. 31-33).

Juan Maria Poizat, of Poizat & Co., testified also that the mail carriage caused his company expense at various ports, and that it had never voluntarily consented to carry mail free of charge (Rec., pp. 34-55).

Julio Gonzalez, of the firm Ynchausti & Co., testified to the same general effect; also that on some trips from Manila to Iloilo he had known the mail to exceed 200 sacks (Rec., pp. 35-38).

It thus appears from the admitted averments of fact in respondents' answer, and the undisputed testimony of witnesses (of which the foregoing is illustrative) that the obligation of the carriers, imposed by the act in question, is not limited to the mere free carriage from port to port, but

also includes the duty of a close adherence to mail schedules, insurance by the carriers against loss of or injury to mail matter, the preference of mail matter over other cargo in loading and unloading, the performance by masters of the vessels of some of the duties of postmasters, the necessity of providing means for loading and unloading the mails even at considerable monetary expense; single shipments of mail from Manila to Iloilo have sometimes amounted to two hundred bags. To this obligation there is of course no limit, under the law contended for by petitioner, save the exigencies of the service and the will of the government officials. Anything which amendments of the postal laws may cause to be mailable will in the natural course be imposed upon these carriers; the parcel post is only one example; the shipment of silver bullion referred to in the testimony (Rec., p. 28), is another.

It is shown by the testimony given before the board that many of the ports of the archipelago are exposed to storms and are unsafe; that the proper anchorages are usually far from shore; that the places where post-offices are maintained are frequently at considerable distances inland. To require that a vessel must pay the cost of hauling the mail from the ship to the post-office on shore is a taking of property. That a vessel may not load or unload cargo until the mail has been first taken care of or may not change its sailing hour without dispatching a messenger from ship to shore, and from the beach to the post-office and return, and not then without waiting for mails to be made up and taken aboard, is an infringement of property rights, justifiable as a regulation but confiscatory when required to be done without compensation. And to require that the masters, owners, and agents of vessels shall be absolutely responsible as insurers for the safe delivery of mail matter and liable for any loss or damage thereto has not even the justification of a proper regulation.

The character of private property taken for public use, whether corporeal or incorporeal, will not affect the question of liability.

Friend *vs.* United States (1895), 30 Ct. Cl., 91.
Pumpelly *vs.* Green Bay Co., 13 Wall., 166.
Bridge Company *vs.* Dix, 6 How., 507.
Peabody *vs.* United States, 43 Ct. Cl., 5.

The following forcible language of Mr. Justice Miller in the opinion of the court in *Pumpelly vs. Green Bay Co., supra,* is instructive in this connection:

> "It would be a very curious and unsatisfactory result if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and may give an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors. (*Id.*, 177-178).
>
> "Much of this seeming conflict of authorities upon this subject has arisen from a confusion as to the definition of property. Property has been well defined to be a person's right to possess, use, enjoy, and dispose of a thing not inconsistent with the law of the land."

The testimony also shows that the railway carriers in the Islands receive annually as compensation for carrying the mails about 90,000 pesos, and that the mail carried by the coastal steamship lines is considerably greater. In other words, the carriage of mail matter by rail, in comparatively smaller volume and for comparatively shorter distances, without limitation of liberty or impairment of commercial convenience, is considered by the Philippine government to be worth 90,000 pesos per annum, and that amount the government actually pays, on an average, to the Island railroads every year. Here, then, is a measure of the loss, definite property loss, suffered by the respondents, who are required to carry a greater volume of mail, under far greater difficulties, without any compensation whatever.

In the face of these facts, which have not at any time been disputed by petitioner or its counsel, can it be said that respondents are not being deprived of property rights? The intent and purpose and effect of the present statute are plain and beyond dispute. Section 309 of act 2657, in simple words, requires that "vessels engaged in the coastwise trade and vessels plying between Philippine ports shall continue to carry mail free." Whether the act be valid or invalid, right or wrong, respondents are being deprived of something of value to them.

However, we do not in any way by the foregoing discussion concede that the invalidity of the legislation is dependent upon such showing. The extent to which respondents' rights may be affected is not necessarily the primary or even the principal consideration in determining the validity of said legislation. It is the legal effect of the act sought to be enforced, and not the extent of its practical effect at the time it is assailed; what the legislation may or can do, and not what it has done.

"Just compensation," as used in constitutions, means full compensation, and the taking of private property for public use for anything less is an invasion of constitutional rights, irrespective of the extent of the infringement.

Spring Valley Waterworks vs. San Francisco, 124 Fed., 574. In this case the court said (p. 601):

> "What is the meaning of 'just compensation'? It is a constitutional phrase, and is found in section 14 of article I of the constitution of this State, where it is provided that property shall not be taken or damaged for public use without just compensation. It is in this constitutional sense that it is used by the Supreme Court of this State in the San Diego case, and by the Supreme Court of the United States in the cases where this question has been under consideration. In *Monongahela Navigation Co. vs. United States,* 148 U. S., 312, 329; 13 Sup. Ct., 622; 37 L. Ed., 463, the Supreme Court of the United States, referring to what constituted 'just compensation,' said, 'Before this property can be taken away from its owners, the whole value must be paid.' And in Virginia and Truckee R. R. Co. *vs.* Henry, 8 Nev., 170, the Supreme Court of Nevada said:
>
> " 'It is difficult to imagine an unjust compensation; but the word "just" is used evidently to intensify the meaning of the word "compensation," to convey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, ample; and no legislature can diminish by one jot the rotund expression of the Constitution.'
>
> "Neither is it in the power of the court to diminish the measurement of just compensation in any degree. Just compensation is an absolute fact, and, when ascertained, must be so regarded in any judgment the court may render. As said by Mr. Guthrie, in his lectures on the fourteenth amendment to the Constitution of the United States, in construing or expounding a constitution the ancient maxim *'De minimis non curat lex,'* has no application. 'The violation of a constitutional right should never be measured or met by any such plea.' "

See also *A., T. & S. F. Ry. Co. vs. Campbell* (61 Kans., 439; 59 Pac., 1051; 48 L. R. A., 251), in which the court said:

"The property of a railroad company consists not alone in its franchise to be a corporation, nor its right of way and track, nor its rolling stock and other tangible property, but it consists in its most essential character and important sense, in the right to charge and collect tolls for the transportation of persons and property over its line. Without the right to take tolls, such corporation could not do business; and a denial of its right to take tolls would as effectually render valueless all of its other property as a confiscation of its other property would defeat its ability to carry on its business. Upon the conception of the right to take tolls, as a species of property belonging to railroad corporations, rest all the decisions of all the courts, both State and Federal, denying the right of State legislatures to restrict such tolls below a reasonable amount. It needs but a glance at the act in question, and but a moment's thought over the consequences to result from a sanction of its provisions, to perceive that it strikes vitally at the fundamental right of a railroad company to own and enjoy that species of property which exists in the form of its franchise to charge and collect tolls. It purports in its title to be, and is, 'An act to require railroad companies to furnish free transportation to shippers of stock in certain cases'; and in its body it requires railroad companies, 'in consideration of the usual price paid for the shipment of a car of stock, to pass the shipper or his employee to and from the point designated in the contract or bill of lading, without further expense to the shipper in the way of fare.' Upon no theory whatever, consistent with the idea that the franchise of railroad companies to take tolls is a species of property, or consistent with the adjudications of the courts that such right of property is protected by the fourteenth amendment to the Federal Constitution, can such an enactment be upheld."

Counsel for petitioner states (page 36 of brief), the rule that "the test for determining whether legislation is confiscatory is its effect upon the entire revenues of the utility con-

cerned. It is not enough to show that no profit may come from a particular service." But in our view this principle, as supported by the cases cited, and without going into the question of the correctness of its manner of statement, can have no application to the present case, for the reason that it applies to statutes prescribing general *uniform* rates and the extent and nature of services to be rendered at uniform rates, and has no reference whatever to a bald taking of property of a public carrier by requiring service without any compensation whatever.

New York & Queens Gas Co. vs. McCall (245 U. S., 345) involved an order of the Public Service Commission of New York requiring a city gas company to extend its mains and service pipes to meet the reasonable needs of a growing community; there was no idea of attempting to require the rendition of the resultant service without charge; the company, of course, received compensation, by means of lawful rates, for the new service. The court stated the principle of the case (p. 351): "Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render." The question involved was one of regulation of service in the interest of the public, not a taking of property without compensation.

Puget Sound Traction Company vs. Reynolds (244 U. S., 574) involved an order of the Public Service Commission of Washington requiring that the carrier, a street railway company, continue the operation of through service on one of its branch lines, and also that through service via certain streets be continued on another of its lines. The service was not to be rendered without charge, and the carrier re-

ceived compensation which was determined to be adequate; the question involved was again a regulation of service, and not a taking without compensation.

Willcox vs. Consolidated Gas Co. (212 U. S., 19) involved somewhat different and complicated questions, but so far as the present consideration is concerned the decision was directed to the reasonableness, from the constitutional standpoint of just compensation, of certain uniform gas rates established by an act of the legislature. We have already referred to this case (*supra*, p. 9), on the direct issue of the constitutionality of the act of the Philippine legislature here in question.

For the reasons stated we do not consider that these cases, nor others cited in petitioner's brief, establish any rule or principle to the effect that in a situation like the present one, where the legislature attempts to impose a requirement of free service for a certain class of transportation, that property rights of the carrier are not taken. The decisions of this court referred to are concerned with the use of certain portions of the carrier's property in unprofitable employment, although the return on the whole property is equivalent to just compensation. But they have no reference to the use of a portion or portions of the carrier's property (or service) for a certain class without any compensation whatever. It is the difference between method and object. In the first instance, the government regulates the method of using the property, but necessarily guarantees adequate return on the whole. In the second instance, the government seeks to regulate the object, that is, to direct and divert a portion of the carrier's property, or service, for the benefit of a class, which receives the benefit without cost to it or remuneration to the carrier. The first is within the law, because the carrier receives just compensation, or its property is not taken. But the second is unlawful confiscation, because by setting up a special class to receive benefits free of charge the governing

authority makes that portion of the carrier's property a thing apart and gives it by force of law to another, whether that other be a class of citizens or the government itself.

It has been further suggested, by counsel for petitioner, by Mr. Justice Carson, of the Philippine Supreme Court, in his dissenting opinion herein, and intimated by the Philippine Supreme Court in deciding a prior case in which it was sought to settle the question of the legality of this practice of carrying the mails free (Villata *vs.* Stanley, R. G., 8154), that considerable expenditures of money are constantly being made by the Philippine Government for the purpose of improving navigation and shipping and securing the safety of vessels; that public lighthouses, wharves and docks are built, surveys, maps and charts prepared, weather reports compiled, licensed pilots furnished, and many other public works carried on, which, it is said, inure chiefly to the benefit of the shipowners and in that way indirectly compensate them for the obligation to carry mail free, and for that reason it cannot be said that their property is taken without compensation. The contention is specious and hardly worthy of argument before this court. Under our system of laws and Constitution, the Government officials are not rulers whose words and decisions are law; the United States from the beginning has adhered to the fundamental principle of a government by laws as contradistinguished from a government by men. Among those fundamental laws is one that "private property shall not be taken for public use without just compensation." The determination of what is "just compensation" does not lie in the will of certain men who may be in official position; such compensation is determined by reference to the principles of law which have been built up through centuries of American and English judicial history; it is compensation directed specifically to the property rights taken; it must be determined in tribunals having authority of law for that purpose and where all the elements of due process are present and opportunity for hearing is given.

In short, the question as to what is "just compensation" is a judicial one and not a legislative or an administrative one.

Monongahela Nav. Co. *vs.* United States, 148 U. S., 312, 327.

Charles River Bridge Co. *vs.* Warren Bridge, 11 Pet., 420, 571.

An apt statement of the principle is contained in Isom *vs.* Miss. Central Railroad, 36 Miss., 300, in which the court said, at page 315:

> "The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so."

The "just compensation" guaranteed to owners of private property taken for public use, cannot be paid in "benefits," in whole or in part.

Monongahela Nav. Co. *vs.* United States, *supra.*

In re Rugheimer (1888), 36 Fed., 376.

District of Columbia *vs.* Prospect Hill Cemetery, 5 App. D. C., 497.

Md. & W. Ry. Co. vs. Hiller, 8 App. D. C., 289.

Quoting from the *Monongahela Nav. Co.* case (148 U. S., at page 325):

> "The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire

amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being, 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken. *This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.*"

Yet petitioner and others have contended, and here contend, that because *in their opinion* respondents receive indirectly the benefit of certain public works it is legal and proper for petitioner to take from respondents, without compensation, other property rights of respondents, to wit, the extensive and constantly increasing service of mail transpor-

tation. The government cannot in such a way make its bargains and exchanges with individuals on its own terms and in disregard of their wishes or will and without giving them an opportunity to be heard. Any alleged compensation of that sort is legally and literally no compensation, not only not just compensation but no compensation whatever.

However, in order that there may be no possible misunderstanding, respondents here state that the alleged indirect compensation to them by reason of various government works is entirely chimerical and imaginary, and whatever benefit they receive is only the same benefit received by all other citizens and members of the community, and not a benefit peculiar to the shipowners. In the first place, the public works named include several items which are not furnished to respondents in exchange for mail service, nor in exchange for any service, but are *sold* to respondents by the government at prices which are presumably adequate and the same as are charged by the government to persons and entities who are not required to perform free mail service. In the second place, not any of the items mentioned are furnished by the government exclusively, primarily, or even principally for the use and benefit of respondents who are required to render the free mail service. Lighthouses, buoys, wharves, coast surveys, and the like, are principally and primarily installed and maintained for the welfare and advantage of the general public. They promote commerce; they protect the life and limbs of the traveler; they reduce the rates of maritime insurance; they reduce passenger and freight rates; they create business for the railroads, the merchants, the manufacturers; they increase the income of the government from taxes. In short, they are as truly a public governmental activity as the maintenance of a police department or a fire department, and in no sense services performed and works built for the benefit of any one class.

Summarizing, we believe it quite clear beyond any reasonable contention to the contrary that respondents have been

and are being deprived of a property right, a legal property right, by reason of the act of the Philippine legislature which petitioner is seeking to uphold, and that said deprivation of respondents' property rights is extensive in its effect upon respondents and of great value to the Philippine Government, and not compensated to respondents in any manner whatever, legal or actual.

Respectfully submitted,

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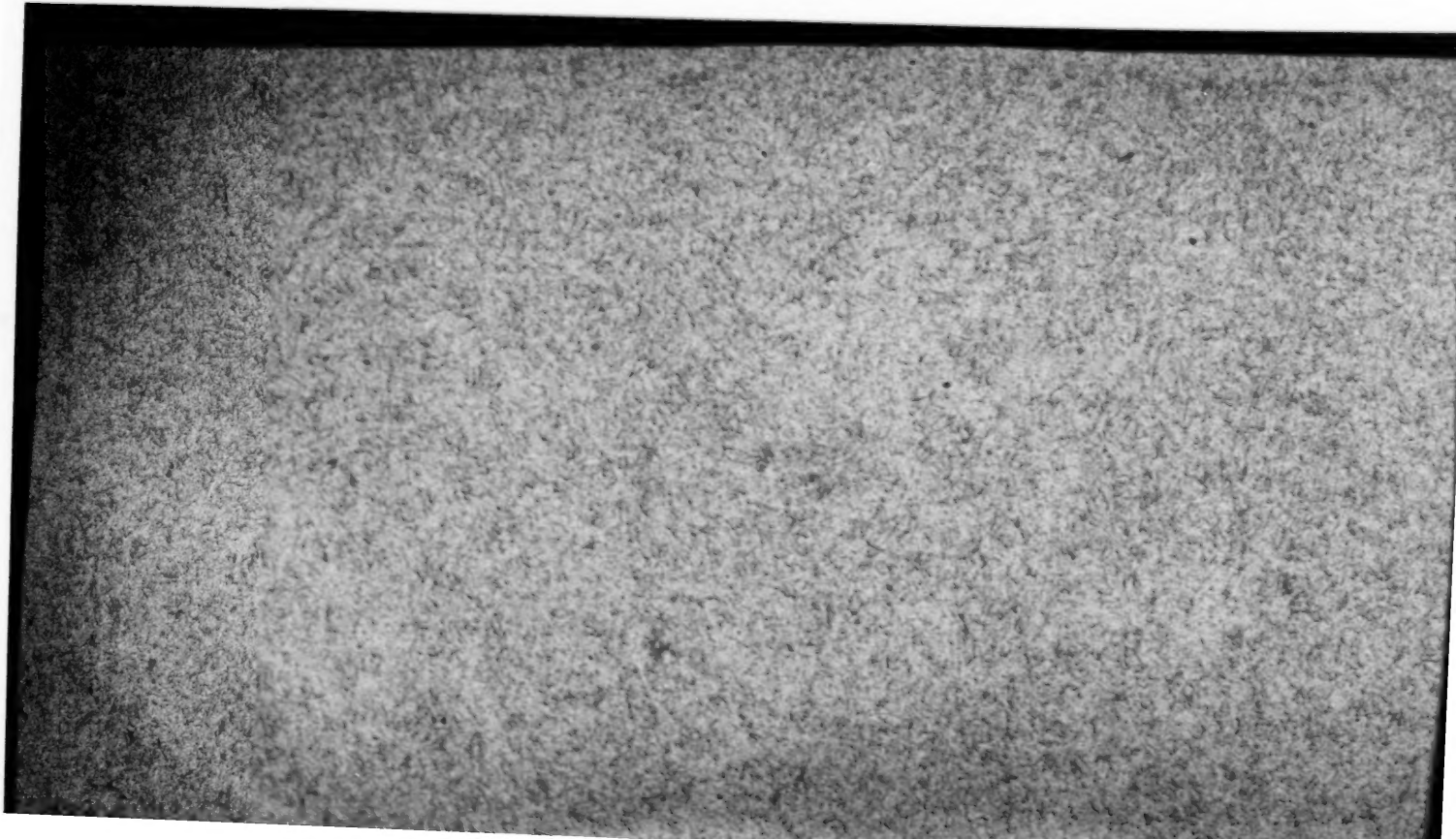

Counsel for Parties.

BOARD OF PUBLIC UTILITY COMMISSIONERS *v.* YNCHAUSTI & COMPANY ET AL.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 190. Argued January 27, 1920.—Decided March 1, 1920.

Acceptance of a license from the Philippine Government to engage in the coastwise trade does not oblige the licensee to fulfill a condition imposed contrary to the Philippine Bill of Rights. P. 404.

In licensing vessels to engage in the Philippine coastwise trade, the Philippine Government is authorized to require, as a condition, free transportation of mails. P. 405.

Such authority is found in its continuous exercise by the local military and civil governments without interference by Congress; in failure of Congress to disapprove local legislation, giving it effect, which under the Act of July 1, 1902, must be reported to Congress; and in its recognition by the Act of April 15, 1904, which authorizes the local government to regulate transportation between local ports and places until American registry of Philippine-owned vessels shall have been authorized by Congress. *Id.*

The Philippine Government having thus authority from Congress to impose the duty to carry the mails free as a condition to engaging in coastwise trade, its law imposing such condition does not deprive the licensee of rights without due process, or take property for public use without just compensation, in violation of the Philippine Bill of Rights. *Id.*

The Constitution does not limit the power of Congress when legislating for the Philippines as when legislating for the United States. P. 406.

Reversed.

THE case is stated in the opinion.

Mr. Chester J. Gerkin and *Mr. Edward S. Bailey* for petitioner.

Mr. Alex. Britton, with whom *Mr. Evans Browne* was on the brief, for respondents.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Was error committed by the court below in deciding that the Philippine law which imposed upon vessels engaged in the coastwise trade, for the privilege of so engaging, the duty to carry the mails free to and from their ports of touch, was void for repugnancy to the Philippine Bill of Rights—is the question which comes before us for decision as the result of the allowance of a writ of certiorari.

The issue will be clarified by a brief reference to the antecedents of the controversy. Under the Spanish law as enforced in the Philippine Islands before the American domination the duty of free carriage as stated existed. Upon the cession of the Islands to the United States and the establishment there of a military government the existing condition of the subject was continued in force. It thus continued until the government passed into the hands of the Philippine Commission and was by that body specifically recognized and its further enforcement directed. Thus it prevailed without interruption until 1902, when the first act of Congress providing a general system of civil government for the Islands was passed, and it further remained operative until 1904, when Congress passed the act of that year specifically dealing with the authority of the Philippine Government to provide for the coastwise trade, as follows (33 Stat. 181):

"Until Congress shall have authorized the registry as vessels of the United States of vessels owned in the Philippine Archipelago the government of the Philippine Islands is hereby authorized to adopt, from time to time, and enforce regulations governing the transportation of merchandise and passengers between ports or places in the Philippine Archipelago."

In fact the continued operation of the obligation to

carry the mails free which arose from engaging in the coastwise trade, it may be taken for granted, remained in force until 1916, since the obligation was recognized as being yet in existence and the duty to enforce it for the future was directed by § 309 of the Administrative Code of that year, in which code were also stated the existing provisions as to the registry, licensing, etc., of Philippine vessels. That the requirement continued operative thereafter results from the further fact that it was re-expressed in § 568 of the Administrative Code of 1917, which code was adopted to meet the exigencies created by the later Organic Act of the Philippine Islands enacted by Congress in August, 1916 (39 Stat. 545).

We have not stopped to refer to the Spanish law, to the military orders, to the reports of civilian officials, and to the action of the Philippine Commission on the subject, as above stated, because the references to them were made below in Marginal Note A, which Mr. Justice Carson made a part of his dissenting opinion.

It is undoubted that during all this period vessels were permitted to engage in the coastwise trade only upon the issuance to and the acceptance by them of licenses, the enjoyment of which depended upon the performance of the legal duty of the free carriage of the mails.

The respondents were in 1916 the owners of steam vessels of Philippine registry, licensed to engage in the coastwise trade upon the condition stated, and the controversy before us arose in consequence of a notice given by them to the Philippine Director of Posts that after a date designated they would no longer comply with the duty to carry the mails free. That official sought its enforcement at the hands of the Board of Public Utility Commissioners. Before that Board the respondents, the licensees, relied upon the assertion that the section of the Administrative Code imposing the duty of free mail carriage was in conflict with the provisions of the Philippine Bill of Rights,

guaranteeing due process and prohibiting the taking of private property for public use without just compensation. The Board overruled the defense and awarded an order directing compliance with the law and therefore prohibited the carrying out of the intention to discontinue. In reaching this conclusion the Board held that its sole duty was to ascertain whether the law imposed the obligation to carry the mails free, and if it did, to enforce it without regard to the defense as to the repugnancy of the statute to the Bill of Rights, since that question was proper only to be disposed of by judicial action.

The Supreme Court to which the controversy was taken, not differing as to the existence of the statutory duty, reversed the order on the ground that such duty could not be exacted consistently with the clauses of the Bill of Rights relied upon. No opinion stating the reasons for this conclusion was expressed, but a member of the court dissented and stated his reasons in an elaborate opinion.

It is impossible to conceive how either the guaranty by the Bill of Rights of due process or its prohibition against the taking of private property for public use without compensation can have the slightest application to the case if the Philippine Government possessed the plenary power, under the sanction of Congress, to limit the right to engage in the coastwise trade to those who agree to carry the mails free. It must follow that the existence of such power is the real question which is required to be decided. In saying this we put out of view as obviously erroneous the contention that, even though the Bill of Rights applied and limited the authority of the Government so as to prevent the exaction by law of the free carriage of the mails, that result is not applicable here because by accepting a license the ship-owners voluntarily assumed the obligation of free carriage. *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 27-30; *Pullman Co.*

v. *Kansas*, 216 U. S. 56, 70; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, 300, 301; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227, 233–234; *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114.

To what extent the Bill of Rights limits the authority of the Government of the Philippine Islands over the subject of the free carriage of the mails is, then, the determinative factor. Beyond doubt Congress, in providing a Bill of Rights for those Islands, intended its provisions to have there the settled construction they have received in the United States. But it must be and is indisputable that when the provisions of such Bill come to be applied to governmental powers in the Philippine Islands, the result of their application must depend upon the nature and character of the powers conferred by Congress upon the Government of the Islands. To illustrate, where a particular activity in the Philippine Islands is, as the result of power conferred by Congress, under governmental control to such an extent that the right to engage in it can be made by the Philippine Government dependent upon the performance of a particular duty, it is obvious that the exaction of such a duty, as such prerequisite condition, can be neither a denial of due process or a taking of property without compensation.

Coming to the proposition to which the case is therefore ultimately reduced, we see no reason to doubt that the Philippine Government had the power to deal with the coastwise trade so as to permit its enjoyment only by those who were willing to comply with the condition as to free mail carriage and therefore that no violation of individual right could have resulted from giving effect to such condition. We reach this conclusion because the possession and exercise of such power in the Islands before their cession to the United States, its exertion under the military government of the United States which followed the cession, and its continuance by every form of civil

government created by Congress for the Islands, compels to that view in the absence of any law expressly providing to the contrary or which by reasonable implication leads to that result.

Indeed, the conclusion that the power was possessed does not rest alone upon the general consideration stated, since it is additionally sustained by recalling the express provision of the Act of Congress of 1904, to which we have previously referred, giving authority for the registry of Philippine vessels and recognizing the power of the Government of the Philippine Islands to deal with the coastwise trade, an authority which, as it contains no provision tending to the contrary, must be construed as applicable to and sanctioning the power which had been exerted from the very inception of the American domination, to provide as to that trade for the free carriage of the mails. In other words, in view of the power to impose the burden in question, exerted in the Philippine Islands from the beginning and which was then being exerted under the authority of Congress, the conferring by Congress upon the Philippine Government by the Act of 1904 of the authority to make regulations concerning such trade was a recognition of the right to make the regulation theretofore made, which was then in force, and which continued to be in force up to the time of the bringing of this suit, without disapproval or change by Congress.

When the authority which the Act of 1904 gave is borne in mind it makes it clear that the mistake which underlies the entire argument as to the non-existence of power here relied upon arises from the erroneous assumption that the constitutional limitations of power which operate upon the authority of Congress when legislating for the United States are applicable and are controlling upon Congress when it comes to exert, in virtue of the sovereignty of the United States, legislative power over territory not forming part of the United States because not

incorporated therein. *Downes* v. *Bidwell*, 182 U. S. 244; *Hawaii* v. *Mankichi*, 190 U. S. 197, 220; *Dorr* v. *United States*, 195 U. S. 138; *Dowdell* v. *United States*, 221 U. S. 325, 332; *Ocampo* v. *United States*, 234 U. S. 91, 98.

The error which thus underlies the whole argument becomes more conspicuously manifest by recalling that Congress in the Act of 1904 expressly provided that the authority which that act gave should exist only until Congress should otherwise provide, and, besides, that before the passage of that act, the Act of July 1, 1902, c. 1369, § 86, 32 Stat. 691, 712, provided "that all laws passed by the government of the Philippine Islands shall be reported to Congress, which hereby reserves the power and authority to annul the same."

Judgment reversed.